THE VILNA QUESTION

CONSULTATIONS

OF

MM. A. DE LAPRADELLE, LOUIS LE FUR,
AND ANDRÉ N. MANDELSTAM

CONCERNING

THE BINDING FORCE OF THE DECISION OF THE CONFERENCE OF AMBASSADORS OF MARCH 15, 1923

AUTHORIZED TRANSLATION FROM THE ORIGINAL TEXTS

LONDON
HAZELL, WATSON & VINEY, LD.
52 LONG ACRE, W.C.
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IDENTICAL LETTER

from

M. PETRAS KLIMAS

Envoy Extraordinary and Minister Plenipotentiary of Lithuania in France

to

MM. ALBERT DE LAPRADELLE, LOUIS LE FUR, AND ANDRÉ N. MANDELSTAM

LEGATION OF LITHUANIA,
PARIS, *May* 1, 1928.

DEAR AND HONOURED COUNCILLOR,—

The Government of the Lithuanian Republic is desirous of ascertaining the opinion of eminent international law specialists on the question of the validity, so far as it is concerned, of the decision of the Conference of Ambassadors of March 15, 1923, on the subject of the Lithuano-Polish frontiers. In consequence of this, and in accordance with my Government's instructions, I have the honour to ask you, dear and honoured Councillor, to inform me whether you consent to express your opinion on this question, which my Government submits in the following form :

The Government of the Lithuanian Republic, taking into consideration that the Council of the League of Nations, by a resolution dated March 3, 1921, instituted a conciliation procedure designed to reach an agreement between Lithuania and Poland regarding the dispute dividing the two countries relative to the attribution of the Vilna territory :

That by virtue of this resolution, direct negotiations were opened between the two parties under the presidency of His Excellency M. Paul Hymans, member of the Council of the League of Nations ;

That the draft agreement elaborated by M. Hymans and recommended by the Council and Assembly of the League of Nations could not be accepted, for different reasons, by either the Lithuanian or the Polish Government ;

That in consequence, by a resolution dated January 13, 1922, the Council of the League of Nations, in conformity with Article 15 of the Covenant, terminated the conciliation procedure instituted by its resolution of March 3, 1921;

That in the aforesaid resolution of January 13, 1922, the Council of the League of Nations expressly declares that "it cannot recognize any solution of a dispute submitted to the League by one of its Members, which may be reached without regard to the recommendation of the Council or without the consent of both the parties concerned";

That by the same resolution of January 13, 1922, the Council proposed to the parties to substitute "as a *modus vivendi*," in the neutral zones previously established in the Suvalki and Vilna regions, "a provisional line of demarcation for these neutral zones, it being of course understood that the territorial rights of the two States would be in no way prejudiced thereby";

That the Polish Government accepted this proposal, but that the Lithuanian Government opposed it categorically and on several occasions, specially declaring in the note of M. Jurgutis, its Minister for Foreign Affairs, addressed on April 8, 1922, to M. Hymans, President of the Council of the League of Nations, that "in spite of all the Council's reservations on the territorial rights of the two States, the Lithuanian Government, by accepting such a declaration, would accomplish an act that would possess the undeniable character of renunciation of the Suvalki undertaking and a legitimation of the state of things created by General Zeligowski's *coup de force*";

That a fresh recommendation of the Council, dated May 17, 1922, contemplating the establishment of a provisional demarcation line traversing the neutral zone, was not accepted by Lithuania;

That without taking notice of these protests, the Council of the League, on February 3, 1923, adopted a resolution establishing a provisional demarcation of the neutral zone;

That this resolution, accepted by Poland, met with the most formal refusal on the part of Lithuania, who, on the basis of paragraph 6 of Article 15 of the Covenant, declared that a recommendation of the Council was applicable only if it were accepted by the two parties;

That nevertheless, Poland, having extended her provisional administration to the part of the neutral zone which was attributed to her by the resolution of February 3, 1923, Lithuania was

obliged to endure the effects of the resolution of the Council of the League of Nations to which she had not given her assent;

That there is cause for retaining from the same resolution of the Council of the League of Nations of February 3, 1923, the passage declaring that " the demarcation thus laid down (see Annex 461a) shall retain the provisional character referred to in the Council's recommendations of January 13 and of May 17, 1922, and the territorial rights of both States shall remain absolutely intact ";

That, according to the terms of Article 87, paragraph 3, of the Versailles Treaty, " the frontiers of Poland, not laid down in the present Treaty, will be subsequently determined by the Allied and Associated Powers ";

That this article, binding upon all the Powers signatory to the said Treaty, of which Poland is one, cannot have this character for States that have not signed it, of which Lithuania is one; that, consequently, the said Article 87 cannot confer upon the Allied and Associated Powers the right of determining the frontiers between Poland and Lithuania;

That, some months after the check to the conciliation procedure instituted by the League of Nations, the President of the Council of Ministers of Lithuania, in a note of November 18, 1922, addressed to the President of the Conference of Ambassadors dealing with the internationalization of the Niemen, made an incidental appeal to the Allied and Associated Powers concerning the Lithuano-Polish dispute;

That, actually, the said note of November 18, 1922, declares that the regime of navigation on the Niemen, instituted by the Versailles Treaty, will receive its application " as soon as Poland, who, in spite of her solemn undertakings towards Lithuania, at present holds Lithuanian territories, shall have honoured her undertakings towards Lithuania, and shall thus have permitted the Lithuanian Government to contract with her relations of peace and amity ";

That immediately after this declaration, the following appeal is inserted in the note of November 18, 1922: " To this declaration the Lithuanian Government would like to add that it would be particularly grateful to the Allied and Associated Powers, if, with a view to expediting the advent of an era of peace and amity between Lithuania and Poland, the Powers would kindly use the right which Article 87 of the Versailles Treaty confers upon them and fix the eastern frontiers of Poland,

in taking account of the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania";

That it follows as well from the declaration preceding this appeal to the Powers as from the reservations with which the appeal itself is invested, that in applying to the Powers, the Lithuanian Government in no way abandoned its rights into the hands of the Conference of Ambassadors;

That on March 15, 1923, the Conference of Ambassadors rendered a decision regarding the frontiers of Lithuania and Poland and attributing the Vilna territory to the latter;

That one of the grounds upon which the Conference of Ambassadors based its competence to render a decision on the question runs: "Whereas, on its side, the Lithuanian Government has already, through its note of November 18, 1922, shown itself anxious to see the said Powers make use of the said rights";

That the decision of the Conference of Ambassadors thus refers only to the first part of the Lithuanian appeal and omits to mention the reservations to which this appeal was subordinated;

That, moreover, the decision of the Conference of Ambassadors declares "that as regards the frontier of Poland with Lithuania, there is cause for considering the *de facto* situation resulting, especially, from the resolution of the Council of the League of Nations of February 3, 1922";

That in this manner the Conference of Ambassadors passed beyond the various recommendations of the Council of the League of Nations expressly reserving the territorial rights of the two States; that particularly, as regards the Council's decision of February 3, 1923, the Conference retained thereof only the laying-down of the demarcation line that formed the object of the Lithuanian Government's most energetic protests, and that in transforming it into a frontier, it invested the line in question with a character of permanence which the Lithuanian Government had precisely dreaded and which the Council had equally repudiated;

That, lastly, the decision of the Conference of Ambassadors was taken without the presence of the Lithuanian Government and without its even having been appealed to, to furnish the slightest explanations on this question;

That the decision of the Conference of Ambassadors was accepted by the Polish Government, but that the Lithuanian Government protested against this decision in a note addressed

on April 16, 1923, to the President of the Conference of Ambassadors, to which note it draws the very special attention of the jurists whom it has the honour to consult to-day;

That in this note, after having exposed its point of view, "the Lithuanian Government solemnly declares that it does not recognize any authority in the decision of the Conference of Ambassadors, and that it maintains in all their integrity the rights of Lithuania to her ancient capital and to all the Vilna territory";

That this note of the Lithuanian Government has not received until this day any reply from the Conference of Ambassadors;

That, on the other hand, on April 21, 1923, His Excellency M. Paul Hymans submitted to the Council a report on "the execution of the Council's recommendation of February 3, 1923, concerning the establishment of a line of demarcation in the neutral zone";

That this report declares that the frontier laid down by the Conference of Ambassadors "is in conformity with the line of demarcation traced in virtue of the Council's last recommendation," and that "a political frontier having thus been determined, in accordance with the procedure laid down in the Versailles Treaty, which was accepted by the Lithuanian Government, the question dealt with by the Council at its last session has now become part of the history of the dispute";

That in the midst of the Council, on April 21, 1923, the Lithuanian delegate declared that "the Conference of Ambassadors, which consists of the delegates of four States represented on the Council of the League of Nations, has taken a decision giving to the Council's resolution of February 3 an interpretation which the Council itself beforehand definitely refused to accept. Further, the Conference has entirely set aside the statements of the Council and of the Assembly of the League of Nations, quoted above, which refused to allow the League to recognize any solution of the Polono-Lithuanian dispute which may be reached without regard to the League's recommendation or without the consent of both the parties concerned";

That, on the contrary, the Rapporteur, M. Paul Hymans, declared "that Lithuania has formally consented to recognize the competence of the Conference of Ambassadors by public acts," which he undertook to prove "by irrefutable facts";

That after the discussion, the President of the Council declared that there was no resolution proposed to the Council,

and that the latter had before it only a progress report of the events that had happened : " it took note of this progress report without expressing any opinion, since there was no resolution before it " ;

That the Council at the same time took note of the observations offered both by M. Hymans and the Lithuanian delegate ;

The Lithuanian Government is desirous of ascertaining your opinion on the following question :

In law and equity, is the Government of Lithuania bound by the decision of the Conference of Ambassadors of March 15, 1923, concerning the frontiers between Poland and Lithuania ?

Please accept, dear and honoured Councillor, the assurances of my high consideration.

(*Sgd.*) P. KLIMAS,
Envoy Extraordinary and Minister Plenipotentiary of Lithuania in France.

CONSULTATION

of

M. A. DE LAPRADELLE

Professor of International Law of the University of Paris, Member and former Vice-President of the Institute of International Law

THE undersigned jurisconsult, Professor of International Law of the University of Paris, Member and former Vice-President of the Institute of International Law, consulted by the Government of the Lithuanian Republic on the following question, **"In law and equity, is the Government of the Lithuanian Republic bound by the decision of the Conference of Ambassadors, of March 15, 1923, concerning the frontiers between Poland and Lithuania?"**—after having stated that the question thus submitted does not affect the substance of the question of the frontiers between Poland and Lithuania, but the juridical nature and consequently the value, binding or otherwise, of the decision of the Conference of Ambassadors of March 15, 1923, expresses the following opinion:

I

FACTS

On February 16, 1918, at Vilna, the Council of Lithuania (Taryba), as the sole authorized representative body of the Lithuanian people, on the basis of the recognized right of the free self-determination of peoples, proclaimed the re-establishment of an independent Lithuanian State, founded upon a democratic basis, with Vilna as capital, and the suppression of all political ties that had existed with other peoples. On March 23, 1918, the Lithuanian State was recognized by the German Empire, and, on July 11, 1918, the Taryba, transformed into a Council of State, offered the crown to a German, the Duke of Urach, a distant descendant of a princely Lithuanian family. Then German influence diminished. On November 2 the offer

was withdrawn. On November 11 a first Lithuanian Government was formed, under the presidency of Professor A. Voldemaras. On April 29, 1919, Professor Voldemaras, President of the Lithuanian delegation, on behalf of his Government, addressed the following communication to the President of the Peace Conference:

"In order to avert the danger of a Bolshevik invasion threatening Lithuania and Poland, the Lithuanian Government proposed to the Polish Government the organization of a common defence on the following conditions: Poland should undertake to recognize Lithuania as a free and independent State within the boundaries demanded by Lithuania at the Peace Conference, i.e. the Governments of Kovno, Vilna, Grodno, and Suvalki, with Vilna as capital. Until the solution of the Lithuanian question by the Peace Conference, the Polish Government should undertake to respect the sovereign rights of the Lithuanian State over the territories of its State thus delimited."

On June 13, when the Poles were advancing into Lithuanian territory, Professor Voldemaras, in a note to the Supreme Council of the Allied Powers, begged the Governments of the Entente to invite the Polish Government to suspend the invasion of Lithuanian territory, which had no connexion with the struggle against the Bolsheviks, and to conclude a treaty with the Lithuanian Government on the subject of a provisional demarcation line between the Polish and Lithuanian armies. On June 18 the Chief of the French Military Mission in Kaunas (Kovno), Colonel Reboul, fixed a line which was not to be interpreted as an attribution, even momentary, of territory: "It is to be regarded simply as a provisional occupation for a military or police purpose. It is not in any way to prejudge the decisions of the Peace Congress, which alone shall fix the boundaries of both States." Although this demarcation line, fixed entirely without the participation of the Lithuanian delegation, may seem very disadvantageous for Lithuania (for instance, it left Vilna and Grodno on the Polish side), the Lithuanian Government, in its note of June 23, 1919, "thanked the Governments of the Allied Powers for having imposed the demarcation line which protects at least a part of Lithuania against Polish incursions." But the will of the Supreme Council was not respected. In several places the Poles overstepped the line. On July 11 the Marshal Commander-in-Chief of the Allied Armies, acting in virtue of instructions which he had received from the Supreme

Council of the Allied and Associated Powers, invited the Polish Government to withdraw its troops, with the least possible delay, to the south of the "demarcation line." The Poles took no notice of this formal order. On July 27, 1919, the Supreme Council was obliged to lay down a new demarcation line, named after Marshal Foch, which allowed the Poles to occupy a larger zone of Lithuanian territory. This new line was in turn violated by the Poles. On August 30, 1919, Professor Voldemaras, in a long note to the Supreme Council of the Allies, avowed the fear "that the Poles have carried out their invasion with the preconceived idea of confronting the Peace Conference with the accomplished fact of this occupation." To no purpose did the Polish Government address to the Lithuanian Government a note in which it assured the latter that to-day as in the past it ardently desired to establish the best relations with the Lithuanian nation and to work in concert with it, while relying upon the principle of the free self-determination of peoples. Professor Voldemaras stated that, "having cut off the occupied localities (as for example Vilna and its immediate environs) from all communication with the rest of Lithuania, by making use of all means of moral pressure, the Poles are endeavouring to induce the inhabitants of the occupied territories to accept the annexation of those regions to Poland." Repudiating any suspicion of German influence, protesting its democratic sentiments, and its anxiety to guarantee the rights of minorities, the Lithuanian Government concluded: "Lithuania remembers with horror some hundred years of Russian domination, and does not wish to serve in the future as a corridor between Russia and Germany. The union with Poland would signify the servitude of Lithuania, the stifling of her national life. By recognizing, on the contrary, the independence of Lithuania, and by restoring to her her ancient capital of Vilna, Poland would be assured of having a friendly people as neighbour."

But it was in vain that direct negotiations were undertaken. On July 4, 1920, the Polish Government decided to recognize the Constituent Assembly of Lithuania and the Government put in office by the said Assembly as *de facto* independent organizations. "The Polish Government is convinced that the adaptation of principles of justice and of equity to all the relations between the two countries and to the national minorities on both sides will form the surest basis of this amity." And Kaunas replied: "The Lithuanian Government thinks that the establish-

ment of amicable relations is less hampered by the question of national minorities than by the fact of the non-recognition of the Lithuanian State and by the frequent violation of its fundamental rights on the part of Poland" (July 24, 1920).

On July 12, "proceeding from the right, proclaimed by the Russian Socialist Federated Soviet Republic, of all nations to free self-determination," Soviet Russia, in the Treaty of Moscow, "recognizes without reservation the sovereign rights and independence of the Lithuanian State, with all the juridical consequences arising from such recognition, and voluntarily and for all time abandons all the sovereign rights of Russia over the Lithuanian people and their territory." From the description of the boundary it follows that Russia, to whom until that moment sovereignty over the Vilna territory had belonged, renounced it in favour of Lithuania. The Bolsheviks entered Vilna on the 14th. The Lithuanian troops penetrated into it on the 15th, but being obliged to retire, with the exception of some supply troops, entered only in August, immediately followed by the Lithuanian Government, which installed itself there, and in their turn by all the diplomatic representatives. About the same time, the Poles, in retreat before the Red Army, evacuated all Lithuanian territory, and the Lithuanian troops resumed possession.

At the end of August the situation was reversed. Pursuing the Bolsheviks, the Polish army encountered Lithuanian detachments beyond the demarcation line (the so-called Curzon line) adopted on December 8, 1919, by the Principal Allied and Associated Powers who, "without prejudging subsequent provisions that will have to fix the definite eastern frontiers of Poland, declare that they recognize henceforth the rights of the Polish Government to proceed, on the conditions previously contemplated by the Treaty of June 28, 1919, with the organization of a regular administration." Fixed without the participation and even without the knowledge of the Lithuanian Government, to which it had never been communicated, the line could not possess any binding value for the Lithuanian Government (telegrams from M. Purickis, Minister for Foreign Affairs of Lithuania, to M. Sapieha, Minister for Foreign Affairs of Poland, of September 6 and 12, 1920). On September 8, 1920, the Polish Government appealed to the League of Nations, and accused the Lithuanian Government of violating neutrality by passing the line of December 8, 1919, in order to co-operate with

the Bolshevik army, whereupon the Lithuanian Government declared itself "ready to prove its loyalty to the laws of neutrality before the tribunal of the said League," and " willing to submit the Lithuano-Polish differences to the decision of the League of Nations " (telegrams of September 12 and 21). On September 20, the Council of the League of Nations, after having demanded the suspension of all hostilities, proposed to the Lithuanian Government that it should adopt as a provisional demarcation line, with the reservation of all its territorial rights and pending the result of direct negotiations with Poland, the line fixed by the Supreme Council of the Allied Powers in its declaration of December 8, 1919; and to the Polish Government, that during the war then raging between Poland and the Government of the Soviets, it should respect the neutrality of the territory, occupied by Lithuania to the east of the specified demarcation line, with the reservation of all Polish territorial rights.

Direct agreement between the two parties took place at Suvalki on October 7, 1920, under the auspices of the Military Control Commission of the League of Nations, which had arrived there on the 4th. A demarcation line was laid down which, " without deciding in advance what are the territorial rights, until all disputed questions between the Poles and Lithuanians shall have been definitely settled," left to Lithuania possession of the Vilna territory.

Immediately afterwards, however, General Zeligowski occupied Vilna in defiance of all his Government's promises. M. Léon Bourgeois, then President of the Council of the League of Nations, officially referred to this occupation, both verbally and in writing, to M. Paderewski, Polish delegate to the League, as " a violation of the undertakings given to the Council."

The consequence of this violation, which continues, is that after having sought a solution of the territorial dispute through a plebiscite organized under its auspices, the Council renounced it. " In the Council's opinion, the plebiscite should be carried out in complete freedom. It should be sincere and rapid. This has now become impossible owing to General Zeligowski's *coup de force.* The League of Nations has not desired a disguised plebiscite and the maintenance of these troops in the Vilna region. Since the region was occupied by a military force, long preparation would have been necessary, requiring for many months the maintenance of an international expeditionary corps " (Seventh sitting of the Polono-Lithuanian Conference, Brussels,

May 13, 1921). "As Mr. Balfour has just recalled, it is the presence of General Zeligowski's troops that has prevented the plebiscite . . . the withdrawal of his troops was necessary. This first step has not been taken. It is because it has not been taken that any fresh progress has since been impossible" (M. Léon Bourgeois to the Council of the League of Nations, June 27, 1921).

Direct *pourparlers* then took place at Brussels. Neither a mediator nor an arbitrator, according to his own expression, M. Hymans directed them. He thought he could outline a suggestion. "The Lithuanian Government shall undertake, by means of a constitutional statute, to establish Lithuania as a Federal State, consisting of the two autonomous cantons of Kovno and Vilna. . . . The Federal capital shall be established at Vilna." Some other treaties completed the system. M. Hymans demanded a reply from the two delegations. On May 27 the Lithuanian delegation replied that it accepted the preliminary draft as a basis of discussion. The Polish delegation demanded that the negotiations should be postponed until the lawful representatives of the population, in the capacity of a delegation from Central Lithuania, could take part in them. The Council had decided to begin direct negotiations between the two Governments. These negotiations had begun. It was impossible to admit a third party to them. Hence an interruption of the *pourparlers* and their return to the Council. On June 28 the Council, having unanimously approved the preliminary compromise draft agreement prepared by M. Hymans, desired that direct negotiations between the parties should be renewed at Brussels on July 15. Both parties were somewhat indifferent. At the end of August they were given a rendezvous at Geneva. M. Hymans amended his draft. The Lithuanian Government seemed ready to consent; but not the Polish Government. The Council on September 20, 1921, and the Second Assembly on September 24, recommended it. Nevertheless, after careful examination, neither of the parties could accept it—Lithuania because she feared for her independence, and Poland because she wished to keep Vilna.

On January 13, 1922, the Council regretfully announced that the Lithuanian and Polish Governments, the former through a note dated December 26, 1921, and the latter through the verbal declaration of its representative on the Council at the sitting of September 20, had refused to accept the Council's final recom-

mendation of the same day, designed to settle the dispute that had arisen between the two Governments in the Vilna region. It took note of these refusals, which put an end, in accordance with Article 15 of the Covenant, to the conciliation procedure instituted by its resolution of March 3, 1921. At the same time, it formally declared that it "cannot recognize any solution of a dispute submitted to the League by one of its members, which may be reached without regard to the recommendation of the Council or without the consent of both the parties concerned."

Nevertheless, after having opposed a plebiscite under the control of the League of Nations by the maintenance of General Zeligowski, the Polish Government, on the strength of a decision of the Polish Diet of November 17, 1921, authorized him to organize elections for the Vilna Diet, as the result of which the latter, on February 20, 1922, declared itself in favour of the annexation of the Vilna territory to Poland. On March 24, 1922, the Polish Diet voted the annexation pure and simple of Vilna to Poland.

The Lithuanian Government protested against this act of the Polish Government which, having disavowed Zeligowski and declared him a rebel, profited by the consequences of his *coup de force* and the violation of an international undertaking. The Council of the League of Nations took note of this.

On September 15, 1922, the Third Assembly of the League of Nations unanimously approved a report in which it is stated that the decision of January 13 has "retained all its value."

On February 3, 1923, the Council of the League of Nations decided to divide the neutral zones, established by the Military Control Commission, one in the Suvalki region in October 1920, the other in the Vilna region on November 29, 1920, and replace them by a demarcation line, "the territorial rights of both States remaining absolutely intact." Fearing lest its acquiescence, notwithstanding this reservation, should be interpreted as a renunciation of the Suvalki Agreement or as a tacit recognition of the state of things created by General Zeligowski's *coup de force* and by the vote of the Polish Diet of March 24, 1922, concerning the annexation of the Vilna territory to Poland, the Lithuanian Government protested "that it cannot accept or recognize the modifications contemplated for the neutral zone and contained in the Council's resolution."

A fortnight had not elapsed when the Polish Government

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addressed to the Conference of Ambassadors a request that the Conference should fix Poland's eastern frontiers.

On March 15, 1923, the Conference of Ambassadors adopted a decision with the object of transforming the demarcation line fixed by the Council on February 3 as a provisional line, with the reservation of territorial rights, into a permanent and definite boundary.

II

LAW

What, in law, should be thought of this decision of the Conference of Ambassadors?

This question merits examination from two standpoints: firstly, within the limits of the Society of States, the abstraction formed from the League of Nations; and, secondly, within the limits of the League of Nations.

Within the Limits of the Society of States

Within the limits of the Society of States, prior to the War, the Conference of Ambassadors had a precedent, viz. the Concert of the Great Powers.

At the Peace Conference only the Principal Powers were represented, viz. France, Great Britain, Italy, and Japan, as Allies, and one other, the United States of America, as an Associated Power, whose scruples had to be respected. Nevertheless, although numerically different, since Germany, Austria-Hungary, and Russia no longer form part of it, the Concert of the Principal Allied and Associated Powers does not differ in character from the Concert of the Great Powers, European up to 1898, European and American after the Treaty of Paris of December 4, 1898, and European-American-Asiatic after the Peace of Portsmouth of September 5, 1905. Now it may be affirmed that under the badly regulated, badly co-ordinated regime of the Society of States, the Concert of the Powers would never have ventured, at a time of entire peace, to determine the territorial disposal of a State without the latter's free assent and even, in the wake of a war, without its express assent, albeit not free. In virtue of Public Law in operation, it is a principle that only the total conquest of a State, the *debellatio*, can deprive a State of its territory by the simple fact of force of arms, without any kind of treaty.

Now, in the case of Lithuania, we fail to find war and *debellatio*, or a simple treaty.

Not only were the Principal Allied and Associated Powers, which claimed through their organ, the Conference of Ambassadors, to fix the territorial status of Lithuania, in spite of her protests, not at war with her; but Poland, who alone carried on this war and did not claim arbitrarily to impose a solution upon Lithuania as regards the Vilna question, did not take possession of the Vilna territory even by an act of regular warfare, but, without any preliminary declaration of war, by an act which she has herself disavowed as the proceeding of an undisciplined soldier.

One cannot then see how, in positive law, under international public law prior to the League of Nations, the Great Powers would have been allowed to decree the attribution of the Vilna territory to Poland.

It is true that, on several occasions, notably in 1878, through the Berlin Treaty, the Powers, in virtue of their own authority, fixed the boundaries of States that were then born into independence for the first time.

May not Lithuania, a new State, be subjected, like Bulgaria in 1870, by the common will of the Powers, to a certain territorial situation, the determination of her frontier being in a discretionary manner at the mercy of the Great Powers, which have become the Principal Allied and Associated Powers?

To reason thus would be in conformity with neither the precedents of history nor the conditions of the recognition of a State.

1.—It would not be in conformity with the precedents of history.

If, indeed, the Powers, under the Berlin Treaty, in virtue of their own authority, determined the boundaries of the new States, without having either consulted them at the Berlin Conference, or asked them to sign the Treaty, it was because those Powers, being guarantors of the territorial integrity of the Ottoman Empire, by virtue of the Paris Treaty of March 30, 1856, included in this obligation, interpreted in accordance with ends more political than juridical, a title to fix the conditions and limits within which they would consent to the diminution of this integrity. Here, on the contrary, the Powers are not guarantors of the territorial integrity of the State—Russia—from which Lithuania has broken away.

2.—It would not be in conformity with conditions of recognition.

If, in 1879, one could still, under certain belated systems, speak of a discretionary recognition, which the Powers might subordinate to such or such condition, were it even a territorial condition, it is since the end of the nineteenth century and the beginning of the twentieth century, that the theory of recognition has evolved. From constitutive, individual, arbitrary, subject to modalities (condition or term), it has been progressively transformed. In modern law, even before the Covenant of the League of Nations, it should be regarded as declarative, compulsory, and, on this ground, shorn of all conditions.

To remain within the limits of the Society of States, under the former regime of the Concert, one cannot see how the latter, by a discretionary act, in virtue of its own authority, could impose upon a new State, in this case Lithuania, such a boundary as would suit it.

It is true that Article 87 of the Versailles Treaty prescribes : " The boundaries of Poland, not laid down in the present treaty, will be subsequently determined by the Principal Allied and Associated Powers."

But Article 116 of the Versailles Treaty reads : " Germany acknowledges and agrees to respect, as permanent and inalienable, the independence of all the territories which were part of the former Russian Empire on August 1, 1914."

Then Article 117 : " Germany undertakes to recognize the full force of all treaties or agreements which may be entered into by the Allied and Associated Powers with all States now existing or coming into existence in future in the whole or part of the former Empire of Russia as it existed on August 1, 1914, and to recognize the frontiers of any such States as determined therein."

Thus Germany is required to recognize the boundaries which the Allied and Associated Powers (the Powers—and no longer the Principal Powers) shall determine, by treaties with the new States dismembered from the Russian Empire.

The method of delimitation contemplated, not only according to the spirit of the text (respect for independence), but according to its letter (frontiers to be determined by treaties with the Allied and Associated Powers), indicates that the Principal Allied and Associated Powers have here no special right that they may exercise through their organ, the Conference of Ambassadors.

Likewise Article 89 of the Treaty of Saint-Germain, Article 59 of the Treaty of Neuilly, and Article 74 of the Treaty of Trianon, concerning the frontiers of States succeeding to the former Austro-Hungarian monarchy, establish, in the form of a general provision, the exclusive delimitative competence of the Principal Allied and Associated Powers.

Nothing could be simpler, from the moment that the question concerned the Powers signatory to those treaties. In accepting those various articles, the interested States undertake to accept, through a delegation of power, in a mandate given to the Principal Powers, the result of operations of delimitation which shall be pursued between the Conference of Ambassadors, the mandated authority, and the interested Border States.

But the Allied and Associated Powers have not included in the terms of the mandate, which was confided to them, the regulation of their boundaries with the States detached from Russia (Paul de Lapradelle, *La frontière*, Paris, Les Editions Internationales, 1928, p. 133).

In the same way as Article 117 of the Versailles Treaty, Article 87, paragraph 2, of the Saint-Germain Treaty, Article 72, paragraph 2, of the Trianon Treaty, and Article 58 of the Neuilly Treaty stipulate that the ex-enemy States recognize in advance the boundaries which the new States dismembered from Austria-Hungary may be able to conclude with the States sprung from or destined to spring from Russian territories; by which was explicitly acknowledged the eventuality of a normal delimitation, arrived at by consent of the parties concerned, not permitting an abnormal delimitation by the Principal Powers in virtue of their own authority.

Even supposing that it had been otherwise, neither Russia nor Lithuania is a party to these treaties: Russia, to whom the Vilna territory belonged on August 1, 1914, and Lithuania, who to-day claims it by virtue of an agreement with Russia. Lithuania is a foreign person in relation to the treaties that have conferred special powers upon the Principal Allied and Associated Powers for other territories than those of Russia on August 1, 1914. She is a third party to whom the law emanating from the convention is not applicable. Lithuania can be bound only by her own signature. She has not given it.

It is therefore permissible to conclude that, were it necessary

to exclude from the Peace Treaty the first part (League of Nations Covenant) and to argue within the law subsequent to the War, according to the principles of the previous epoch, no doubt can exist that: (1) The recognition of Lithuania by the Powers may not be subordinated to a certain territorial situation, which, for that matter, has never been mentioned as an express condition of this recognition (above all when the representatives of the foreign Powers followed the Lithuanian Government to Vilna, the capital, when that city, after the War, passed under Lithuanian authority). (2) No contractual title can create, to the profit of the Great Powers—to-day the Principal Allied and Associated Powers—a discretionary power of delimitation which, in any case, could proceed only from a delegation—a delegation that has not been authorized by treaty. (3) The Principal Allied and Associated Powers have not even troubled to reserve themselves, either in regard to Russia or in relation to the new States issuing from the former Russian Empire, the right to which they subjected the States succeeding to the former Austro-Hungarian monarchy: the decision of March 15, 1923, takes note of the fact that in the Riga Treaty of March 18, 1921, Poland has laid down her boundary direct with Russia. Why should not Lithuania be able to do in the Moscow Treaty that which Poland has been able to do in the Riga Treaty?

These conclusions commend themselves the more strongly in that when in doubt one must presume liberty—in this case independence. But there is no doubt: the interpretation is certain.

One therefore fails to see upon what foundation, principle, or text, the Principal Allied and Associated Powers, decreeing through the organ of the Conference of Ambassadors, should claim to impose upon Lithuania territorial restrictions without her consent.

To render it otherwise it would have been necessary for the Conference of Ambassadors to receive from the two parties, Poland and Lithuania, the powers of an arbitrator.

It is essential to say "powers of an arbitrator," and not of a "mediator," since mediation has no other effect than to offer a solution for the free acceptance of the States between which it is intervening. Arbitration alone has binding force. But precisely because it has binding force it must be agreed to—agreed to in a formal manner, if not within the formal limits of an express

compromise, then at least under conditions which would leave no doubt as to the common will of the parties (according to the just observations of the Permanent Court of International Justice, *Advisory Opinion*, No. 12).

If we take the decision of the Conference of Ambassadors, we cannot help remarking that it proceeds as a legal decision, by preambles. But it is not sufficient that a text should proceed by preambles, i.e. by motives, in order to form an arbitral award. Arbitration assumes acceptance by the party; this is lacking. Arbitration is only a form of the application of justice. Now, one of the minimum guarantees of justice is the hearing of the parties; this is lacking. The more so, while entirely affecting to proceed as an arbitral award, the decision sets out at the beginning to be dictatorial: "Whereas (it says) in accordance with the provisions of Article 87, paragraph 3, of the Treaty, it pertains to the Principal Powers to determine the frontiers of Poland that are not specified by the present Treaty." But, as we have seen, this text, as an attributive of unilateral competence, is here without value. The simple fact that it is recalled shows that the decision of March 15, 1923, admitted that its title to competence was not based upon the consent of the parties. Nevertheless, in terms which vary, according to whether one or the other of the parties is concerned, the decision, in two preambles, insinuates: "Whereas the Polish Government, on February 15, 1923, addressed to the Conference of Ambassadors a demand that the Principal Powers which are here represented should make use of the rights which the said article confers upon them," and "whereas, on its part, the Lithuanian Government has already, through its note of November 18, 1922, *shown itself anxious* to see the said Powers make use of the said rights." A *demand* on the one side; *anxiety shown* on the other; both of different dates—Poland's *demand* after Lithuania's *anxiety*. These are not two consents formed on the submission of a dispute to the same judge.

But perhaps there should be on both sides an adhesion to the same competence—a competence preconstituted by the Versailles Treaty (Article 87). Thus to interpret the decision of March 15 would be to deform it, since: (1) If the competence exists, at least as regards Poland, to what end is it necessary to recall her acquiescence (the text moreover does not speak of the *acquiescence* but the *demand*) of February 15, 1923, seeing that

Poland, bound by the Versailles Treaty, would not have to give, subsequently to the Treaty, her adhesion to any portion of the text of this same treaty? (2) "To show herself *anxious* to see the Principal Powers make use of the rights which they hold from Article 87, paragraph 3," is not (the variation of the formulas which should declare the assent of the two parties indicates it) *to demand* of them to make use of those rights, still less *to adhere* to Article 87, paragraph 3, of the treaty!

Let us, however, suppose that written in other terms the sentence permits a like interpretation and merits such a sense. Even thus accepted and understood, it cannot be defended. In order that a third Power should adhere to some part of the indivisible and closed Versailles Treaty, it is indispensable that a text should permit it: for example, the first article, making mention of certain neutrals who are permitted to adhere to the Covenant of the League of Nations; here there is nothing of the kind. Although *adhesion* is far from being so precise as *accession* (cf. Olof Hoijer, *Les Traités internationaux*, Paris, 1928, 1, p. 171 *et seq.*), one anticipates generally that the adhesion of third States will be effected at least by a written notification addressed to one of the contracting States, more frequently that upon whose territory has been held the conference from which the treaty emanates, which communicates it in its turn to all the other contracting Powers; here there is nothing of the kind. In order that the adhesion, bearing upon the formation of the territorial situation of the State, shall be constitutionally valid, under the Lithuanian Constitution of August 1, 1922, Article 30, the intervention of Parliament (Seimas) is required, while under the French Constitution (Article 8 of the Law of July 16, 1875) a law is needed; here there is nothing of the kind. In order that adhesion may be acceptable, it must be pure and simple, since otherwise it leads to the offer of a new treaty, general or partial; here there is nothing of the kind.

It was in an incidental manner, during correspondence relative to the internationalization of the Niemen and the status of Memel, that the question cropped up. Here is that note:

"The Lithuanian Government can but declare afresh that the regime of navigation on the Niemen instituted by the Versailles Treaty, a regime which it accepts without the least reservation, will receive its application as soon as Poland who, notwithstanding her solemn undertakings towards Lithuania, at present holds Lithuanian territories, shall have honoured her under-

takings towards Lithuania, and shall thus have permitted the Lithuanian Government to contract with her relations of peace and amity. To this declaration the Lithuanian Government wishes to add that it would be particularly grateful to the Principal Allied and Associated Powers if, with a view to hastening the advent of an era of peace and amity between Lithuania and Poland, those Powers would be good enough to employ the right which Article 87 of the Versailles Treaty confers upon them and determine the eastern frontiers of Poland, in taking account of the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania."

It could not be with the object of adhering to Article 87 that such reservations would be here introduced.

How can one pretend for a single instant that by an astounding clerical error, the Lithuanian Government could, "without the least reservation," have submitted the fate of Vilna to the Conference of Ambassadors, when it made the remark "without the least reservation" only with reference to the regime of navigation on the Niemen, and then declares that it will accept—a striking restriction—"without the least reservation," the regime of navigation of Versailles on the Niemen, only after the liberation of the Lithuanian territories?

But in this case there is not the slightest clerical error on the part of the Lithuanian Government. The error is one of reading. Take up again the note of November 18, 1922. In this note, so firm on the subject of respect for undertakings by Poland (the Suvalki Agreement), the vital interests and territorial rights (to Vilna) of Lithuania, when the Lithuanian Government addresses itself to the Principal Allied and Associated Powers, what it demands of them is to employ those powers which Article 87 of the Versailles Treaty, signed and ratified by Poland, accords them, in respect of that State, as regards the determination of its eastern frontiers, in order to impose upon that State respect for its undertakings. In regard to Poland, a party to the Versailles Treaty, the Conference of Ambassadors has special powers—powers which it does not possess in regard to Lithuania, a third State. It is to those powers in regard to Poland that Lithuania refers. The Lithuanian Government "*would be particularly grateful* to the Allied Powers" if they would use the authority which the treaty, signed by Poland, gives them over her. It does not assent to their jurisdiction to fix the boundary between the two countries; but it reminds them that Poland

(a signatory to the Treaty) is subject to their decision, and that they possess, henceforth, in regard to her, entire competence to compel respect for solemn undertakings (accepted at Suvalki) and taking into account the vital interests of Lithuania (in Vilna). Addressing itself to the Principal Powers, the Lithuanian Government reminds them that they possess entire authority over Poland without giving them any over Lithuania. It does not assent to a claim of Poland or the Powers tending to impose upon it a competence which, without the assent of Lithuania, does not bind the latter. Observing that the Powers possess, in regard to Poland, special rights, it asks them to have recourse to the same. It is a unilateral request which it addresses to them (i.e. "it would be *particularly grateful*") with a view to availing itself of a text which, in all respects, has authority only in regard to Poland, in order to compel that State to respect the rights of Lithuania. In a word, that which, by both the spirit and letter—a spirit firm and letter precise—the note of November 18, 1922, confides to the Powers is the *protection* of the rights of Lithuania, and not the *appreciation* of those rights by the Principal Powers.

Of the two classes of "preambles" successively invoked by the Conference of Ambassadors, the one relative to its competence, in virtue of its own authority, and the other to its competence of assent, neither is valid in regard to Lithuania.

There remains a last class of motive, viz. "that in the case of the frontier of Poland with Lithuania there is cause for taking into account the *de facto* situation resulting especially from the Resolution of the Council of the League of Nations of February 3, 1923." But with this preamble we are placed outside the Society of States. We thus arrive at the second part of our problem. Is the solution changed if, from the Society of States, we pass to the League of Nations?

The League of Nations

In the League of Nations the powers of the Principal Allied and Associated Powers are extended.

1. In the case of the frontiers of the mandated territories it pertains to the Principal Powers freely to determine them. Two reasons explain it; firstly, the bulk of the ex-enemy colonial territories pass (at least an instant of sanity) to the Principal

Allied and Associated Powers; secondly, there is no proper sovereignty, at least adequately constituted, over the mandated territories, in the absence of sufficient political education of the native population. Here, on the contrary, in the first place, neither Lithuania nor any of the territories of the Russian Empire in 1914 passed under the collective sovereignty of the Principal Allied and Associated Powers; in the second place, all the populations of those territories possess a political education sufficient for the exercise of sovereignty.

To claim that by virtue of a unilateral regulating power the Principal Allied and Associated Powers should possess, over the territory of Lithuania, the same rights as over the mandated territories, is to render materially palpable the error of those that ascribe to the Conference of Ambassadors, in frontier matters, as regards Russia, authoritative and unilateral competence.

2. From other points of view, from the Society of States to the League of Nations, the rôle of the Principal Powers has grown. In the Society of States they formed the *Concert*. In the League of Nations they form the *Council*. The Concert was intermittent; the Council has regular sessions. The Concert admitted only Powers of a certain class, forming a permanent directorate; the Council, alongside permanent members, receives temporary members, Powers that are not of the first magnitude, but which, elected by the Assembly, possess its confidence. The decisions of the Concert bore the character of an order come from above; those of the Council are presented in accordance with a plan of collaboration pursued upon an even footing by States of very different size. It follows therefrom that the Council plays in the League of Nations, without need of sanction, a rôle of mediation (Article 15, paragraph 1, of the Covenant) which, in the Society of States, the Concert adopted but rarely and with difficulty. From this declaration it follows that, in the League of Nations, a normal competence exists to settle disputes, if not by arbitration, even when they are juridical, then at any rate by mediation, above all when they are political.

One might undoubtedly ask whether a dispute in which a State's capital is at stake is among those that depend upon the Council of the League of Nations, bearing in mind the terms of Article 18, paragraph 8. In this respect, however, no difficulty arises; Lithuania, like Poland, has accepted the competence of the Council.

How, in view of the superiority of the Council over the Concert, and consequently over the Conference of Ambassadors, which is but an extension of the Concert, should it be possible, within the Covenant, to seek through the medium of the Conference of Ambassadors a solution which, considering the superiority of the Council over the Concert, can be much more usefully and favourably expected from the Council ?

If the Conference of Ambassadors had had competence to regulate the frontier, it should not have let the matter be pursued before the Council of the League of Nations. The same Powers that form the Conference of Ambassadors were all by permanent right in the Council of the League of Nations. They took part in those numerous regulations of the question. They have, in the very terms of their Resolution, declared that they cannot understand or admit any other settlement than one that is reached with the assent of both parties concerned.

It is not therefore possible for the inferior procedure of the Conference of Ambassadors to assert itself after the suspension of the procedure, superior in all respects, of the Council.

Vainly, in one of these preambles that give it very wrongly the false air of an arbitral award, does the decision of March 15, 1923, say : " Whereas in the case of the frontier of Poland with Lithuania, there is cause for taking into account the *de facto* situation resulting especially from the resolution of the Council of the League of Nations of February 3, 1923." That resolution decided to divide the neutral zone and to replace it by a demarcation line, at the same time specifying that it should retain a provisional character, " the territorial rights of both States remaining absolutely intact." The resolution of the Council of the League of Nations cannot have a *de facto* value but simply a legal value. From its legal value it follows that the question remains intact. Would the Conference of Ambassadors intend that from the moment a solution founded upon mutual consent fails, within the limits of the League of Nations, before the Council, a solution in virtue of one's own authority, based upon the maintenance of the dictatorial powers of the former Concert, is revived ? In that case, however, the *de facto* situation which would arise would not be based upon the resolution of the Council of the League of Nations, but upon the impossibility, as far as the League of Nations is concerned, of achieving anything, which

is quite another matter. And why then pass from the League of Nations to the Society of States, from the Council to the Conference of Ambassadors, when experience, notably that of Upper Silesia, shows that where the Conference of the Principal Powers fails, the Council can succeed ?

Better still—the example of the Memel question proves it—where the Conference of Ambassadors, too exacting, has not been able to succeed, the Council of the League of Nations, more open and broader, can find tranquillizing formulas capable of rallying the common sentiment of the parties ; the more so as the Conference of Ambassadors claims only to give effect to the decision of the Council. Yet on February 3, 1923, the Council declared that the territorial rights of both States remained absolutely intact. A more unfortunate expression has never been employed than that of the " *de facto* situation " to qualify a solution which, were it of insolvency, remains no less a *legal solution*, since it is *according to law* that " the territorial rights of both States remain absolutely intact." There is no " fact " that can prevail against the law. It is then impossible to see how, in the League of Nations, the solution rendered by the Council could be invoked by the Conference of Ambassadors, either as a title to competence or as a basic argument.

There is more. From the instant that the Principal Powers (Great Britain, France, Italy, and Japan), in the Memel affair, carried their dispute on the value of their decision of February 16 to the Council of the League of Nations, they admitted that the decisions of the Council imposed themselves upon the Principal Powers. And, on the other hand, from the moment that the Conference of Ambassadors itself, on March 15, 1923, invoked the Resolution of the Council, it recognized that it could not undertake anything against a decision of the Council.

Now, on January 13, 1922, following upon General Zeligowski's *coup de force*, the Council formally declared that " it cannot recognize any solution of a dispute submitted to the League of Nations by one of its members, which may be reached without regard to the recommendation of the Council or without the consent of both the parties concerned." Then, on September 15, 1922, the Third Assembly of the League of Nations declared that the Council's decision of January 13 " has retained all its value." From that time, the decision of the Conference of Ambassadors, of which the Council of the League of Nations had never had

cognizance save as a report,[1] can have no intrinsic value, but only with the assent of the parties.

On December 7, 1927, the representative of Poland, speaking with reference to a question of the closing of Lithuanian schools in the Vilna territory, deemed it necessary to allude before the Council to the decision of the Conference of Ambassadors of March 15, 1923, in the sense that he regarded it " as finally fixing the frontier between the two States and adopting as a basis the line of demarcation laid down under the direction of the Council of the League." The allegation was tendencious. Further, at the sitting of December 10, the Rapporteur of the Council, M. Beelaerts van Blokland, the Netherlands delegate, inserted in his report the following phrase : " Although it seems to me almost superfluous to say so, it may be useful to note that the decision that I have in view would in no way affect a settlement of the various questions on which the two Governments have differences of opinion, and of which for the moment I shall only mention the rights that the Lithuanian Government claims to have over the territory of Vilna." And his draft resolution with no less clarity concluded in this sense : " *The Council declares that the present resolution in no way affects questions on which the two Governments have differences of opinion.*" Now, this draft was unanimously adopted, with the assent of MM. Zaleski and Voldemaras and the President's congratulations to the Rapporteur. We may therefore state that the Council firmly maintains its decision already quoted, of January 13, 1922, in which it declares that " it cannot recognize any solution of a dispute submitted to the League by one of its members, which may be reached without regard to the recommendation of the Council or without the consent of both the parties concerned."

When the Polish general, by an act of indiscipline, despite the Council's reprimands and its formal disapproval, placed himself in possession of Vilna, albeit disowned, at least apparently, by his Government, he defied the League of Nations. He compromised peace. It is not admissible that, while the League of Nations confines itself to reserving the rights of the invaded State, the Conference of Ambassadors, through a formal resolution, should act in a different sense, with superior authority.

[1] Report of the Sitting of Saturday, April 21, 1923, *Official Journal of the League of Nations*, June, 1923, 4th year, No. vi, Report of the 24th Session of the Council.

One might as well say that if they do not reach an agreement before the Council, the Concert will regulate their differences.

One might as well say that, even as regards nations that have signed the Covenant, their disputes may be regulated upon other conditions than those laid down by the Covenant.

One might as well say that the decisions which, in the Council, certain Powers do not even dream of imposing or even of proposing, may, in the Conference of Ambassadors, by a sudden change of front, be authoritatively dictated by it.

One might as well say that it is permissible, by force, to place the League of Nations, notwithstanding its platonic protests, in the presence of an accomplished fact.

The entire letter and spirit of the Covenant rise up against such a solution.

As regards the authority of the decision of the Conference of Ambassadors of March 15, 1923, the conclusion which, in the Society of States, has undoubtedly already occurred, is henceforth imposed in the League of Nations with at least the same strength of evidence.

Final Observations Relative no longer to Law but to Equity

How, when Article 87, paragraph 4, of the Versailles Treaty provides for the presence of the parties on the Demarcation Commission which shall delimit the boundaries, should the Conference of Ambassadors judge them without having summoned the parties ?

How, when in the Council, the parties are always heard, should they see their interests regulated in the Conference of Ambassadors without even having been invited to expound their views ?

The entire system of the Covenant, from the Council to the Court of Justice, reposes on the idea, of which the Court made a noteworthy application, especially in the case of Eastern Karelia ; i.e. there is no procedure by default.

How, moreover, could the Principal Powers, which, in the Memel case in 1923, signed a Convention with Lithuania under the auspices of the League of Nations, equitably act as judges when, on the other hand, they were present as a party ?

How, lastly, could a territory occupied by a disavowed general, remain, while the dispute is in progress, under the

authority of the State which took it only by transgressing the order and with the censure of the League of Nations ?

How could such a *fact* be equitably retained ?

In both law and equity, the decision of March 15, 1923, lacks foundation.

A. DE LAPRADELLE.

PARIS, *July* 17, 1928.

CONSULTATION

of

M. L. LE FUR

Professor of International Law at the University of Paris, Member of the Institute of International Law

THE undersigned jurisconsult, Professor of International Law at the University of Paris, Member of the Institute of International Law, consulted by the Government of the Lithuanian Republic on the following question—“ **In law and equity, is the Government of the Lithuanian Republic bound by the decision of the Conference of Ambassadors of March 15, 1923, concerning the frontiers between Poland and Lithuania ?** ” has given the following opinion :

The question thus submitted in a very precise manner does not directly have in view the substance of the question of delimitation of frontiers between Poland and Lithuania, but particularly the juridical value of the solution given by the Conference of Ambassadors on March 15, 1923. It asks whether, considering the previous juridical situation, the decision of the Conference of Ambassadors has introduced a modification which ought to be recognized as valid from the standpoint of public international law ?

There is good cause to examine this question successively from the standpoints of positive law and equity.

I

THE STANDPOINT OF POSITIVE LAW

Is the Government of the Lithuanian Republic bound in positive law by the decision of the Conference of Ambassadors ? The result of the decision of the Conference of Ambassadors was to ascribe to Poland a portion of territory which Lithuania

regarded as her own; and—a particularly aggravating circumstance—this portion of territory contains the city claimed by Lithuania as her capital, and in which the independence of the new State was proclaimed on February 16, 1918. The matter, therefore, concerns a transfer or cession of territory which cannot be deemed valid unless it is effected in conformity with the rules laid down by international public law. Now, it is an incontestable and uncontested point that in time of peace there can be no cession of territory without the consent of the State ceding the same. If, then, it is proved—which is no less incontestable—that at a given moment Lithuania had at the time lawful sovereignty and *de facto* possession of that territory, she could not be deprived of it, even in the event of subsequent dispute, save by one of the juridical methods recognized by international law. These are the two points which have to be successively examined.

I

No transfer or cession of territory is possible without the consent of the State ceding the same. A sole exception was formerly admitted in the case of conquest. This exception is to-day formally proscribed among members of the League of Nations by Article 10 of the Covenant, by virtue of which " the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

And present-day international tendencies are so hostile to the idea of conquest that, in case even of a war of aggression where the reparation of all damages caused must be borne " by the aggressor State to the extreme limit of its capacity," Article 15, paragraph 2, of the Geneva Protocol took care to specify that " nevertheless, in view of Article 10 of the Covenant, neither the territorial integrity nor the political independence of the aggressor State shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol."

Furthermore, from another point of view, it is impossible here to speak of conquest. True, during 1919 and 1920, Vilna was the object of successive occupations by the Soviet army and then by Poland; then again by the Soviets and Lithuania. But this troubled period came to an end on July 12, 1920, with the Russo-Lithuanian Treaty of Moscow, and on August 6

following, Vilna was occupied by the Lithuanian army. At that moment Poland was vanquished and the Soviet army was marching on Warsaw. After the readjustment effected with the help of General Weygand and the retreat of the Soviet army, the Polish Government advanced its troops beyond the demarcation line (the so-called Curzon line) which had been fixed on December 8, 1919, by a declaration of the Supreme Council. This declaration gave to the Polish Government the right "to proceed, in accordance with the terms previously contemplated by the treaty of June 28, 1919, with the organization of a regular administration of the territories of the former Empire of Russia, situated to the west of the line above described." That line left the Vilna region well outside the Polish frontiers.

The Polish army constantly advancing, the Council of the League of Nations, by a resolution of September 20, 1920, invited the two Governments to prevent all hostile acts between their troops and to accept the Curzon line as a demarcation line. At the same time as the League of Nations intervened and sent to the spot a Military Control Commission, negotiations were engaged in at Suvalki between Poland and Lithuania. These led, on October 7, 1920, to an agreement signed by the two Governments. This agreement fixed "a demarcation line which does not decide in advance what are the territorial rights of the two contracting parties." But, from two points of view, this arrangement is of capital importance, and we may say that, from the juridical standpoint, it dominates the Polono-Lithuanian conflict. In the first place, the demarcation line is only provisional; that is understood. But—and this is the second point—according to the terms of Chapter V, "the present arrangement . . . *remains in force until all* disputed questions between the Poles and Lithuanians are definitely determined." [1]

This is the last contractual instrument effected between the two Governments. General Zeligowski's *coup de force* took place immediately afterwards. This very speedily necessitated an armistice to arrest the advance, one cannot say of the Polish army, but rather of General Zeligowski's troops which the Polish Government itself described as in revolt. This simple armistice, of a still more provisional nature than the Suvalki

[1] Agreement of Suvalki of October 7, 1920 (*Lithuanian Yellow Book on the Vilna Question*, p. 58). Here, as in the quotations that follow, the italics do not form part of the text.

Agreement, and intended for the time being to terminate hostilities occurring in entire peace, in no wise of course modifies the Suvalki Agreement which had taken place a few days previously between the two Governments. It is, then, this Agreement of Suvalki, styled *treaty* by the final phrase of the accord, which constitutes juridically the last phase of law in the relations between Poland and Lithuania.

Since it is evidently not General Zeligowski's *coup de force*, even without taking into account the formal disavowal pronounced against him at the outset by the Polish Government, that could give Poland lawful sovereignty over the Vilna region, and effect, during entire peace, contrary to the clauses of the Suvalki Treaty, the substitution of the sovereignty of Poland for that of Lithuania over that region, if such a substitution had taken place, it could occur between the two States only from a cession of territory, under the form of a delimitation of frontier or otherwise. It seems, moreover, difficult to speak of a simple delimitation or rectification of frontier on the occasion of an operation which deprives a State of its capital; but, even setting aside this point, a brief review of all the cases that have happened since the Great War shows that, in whatsoever form the question has arisen, not only in the case of territorial cession properly speaking, but even for a simple delimitation or rectification of frontiers, with the unanimous accord of all the international organs involved (the Council or Assembly of the League of Nations, the Permanent Court of International Justice, etc.), on each occasion that the question turned upon a substitution of sovereignty the consent of the interested States has been regarded as the first and indispensable condition of that transfer.

True, the precedents, chiefly isolated, do not always in continental practice possess the decisive importance which they have in Anglo-Saxon countries; but the importance thereof is not less considerable when they are numerous and concordant. And when they are unanimous in a given sense, we can no longer deny that we are confronted by an application of general principles of law recognized by the States, and thus become international custom which is forced upon them on the same basis as a treaty (*vide* paragraphs 2 and 3 of Article 38 of the Statute of the Permanent Court of International Justice). Now it is easy to state this concordance and this unanimity in all conflicts of this order, already numerous, that have occurred since the War,

and this statement ought to possess a decisive value in the question in dispute.

(*a*) In the Aland Islands case, Sweden and Finland—the former of whom was not a member of the Council, and the latter of whom was not even a member of the League of Nations—were both admitted to sit on the Council in order to support their claims; and, once the decision of the Council had been given, the representatives of the two Governments—the Swedish representative not without expressing " the profound disappointment of the Swedish people "—declared *their acceptance of the Council's decision*.

(*b*) In the case of Upper Silesia, the Germano-Polish draft convention drawn up by the Conference at which the two States in dispute were represented, and completed on May 15, 1922, *was accepted and signed* the same day by the German and Polish plenipotentiaries.

(*c*) In the dispute which arose between Bulgaria and the neighbouring States in the wake of the incursion of armed bands into the frontier zone of those States, specially of Yugoslavia, although there was actually involved only a violation of frontier and not a question of delimitation, the Council confined itself to controlling the pacific character of the negotiations entered upon, and it awaited agreement between the Governments of Bulgaria and Serbia-Croatia-Slavonia in order to entrust to a mixed Commission the solution of disputed questions that divided them.

(*d*) The Austro-Hungarian conflict relative to the Burgenland was brought before the Conference of Venice; the two States *reached agreement* on a protocol whereby Austria undertook to accept, as soon as possible, the decision of the Boundary Commission. In case she should be obliged to appeal against those decisions, she declared herself ready to accept the decision which should be recommended by the Council of the League of Nations. The decision of the Council which then ensued, after a fresh conference between the parties, arrived at a settlement which *was accepted by the two parties* and executed by them.

(*e*) The frontier conflict between Hungary and Yugoslavia (region of the Mur) could not be settled, but the same principles were laid down. The Council, not possessing arbitration powers, endeavoured to bring about an *amicable settlement*. The parties having been unable to reach agreement, the Council renounced this amicable settlement, and notified thereof the Conference of

Ambassadors, which proceeded to delimitation in conformity with the provisions of the Trianon Treaty.

(*f*) In the frontier conflict between Hungary and Czechoslovakia (region situated to the north of the mining centre of Salgotarjan), the representatives of the two States declared *their acceptance of the Council's good offices as compulsory arbitration*; the Council's decision was rendered on April 23, 1923, and the two States in dispute *accepted it* as they had undertaken to do.

(*g*) The delimitation of the frontier between Poland and Czechoslovakia (the Jaworzina affair) is of particular importance, not only because Poland is one of the parties in the case, but above all because from certain points of view the situation bears a marked resemblance to that with which we are here concerned. The plebiscite which was to have taken place in certain zones of the frontier region having given rise to a dangerous agitation, the two Governments agreed to entrust the Supreme Council with the definite laying-down of the frontier. Under these conditions, on July 28, 1920, the Conference of Ambassadors traced a line which was accepted in its entirety by the interested parties. But a difficulty arose over the Jaworzina district. The Governments of Poland and Czechoslovakia not having been able, in spite of the renewal of the delay which they had demanded for this purpose, to reach an amicable understanding, the Conference of Ambassadors entrusted the Boundary Commission with the delimitation of the line in question. Czechoslovakia then contested the decision given, because, she said, *in the absence of all agreement between the interested parties*, the Conference of Ambassadors was bound by its previous decision.

The jurists who composed the Drafting Committee of the Conference of Ambassadors, without rejecting the thesis of the Czechoslovakian Government on the necessity of an agreement of the parties, were of a contrary opinion, on the ground that, according to them, the decision of July 28, 1920, had left undetermined a portion of the frontier line in the Jaworzina region. The Conference of Ambassadors then referred the dispute to the Council of the League of Nations, at the same time declaring that it would see only advantages accruing from the Council's acceptance, on the legal point, of the opinion of the Permanent Court of International Justice.

The Court, assembled in extraordinary session, inquired into the juridical basis of the decision of the Conference of Ambassa-

dors, and declared that " the decision taken on July 28 is therefore the fulfilment at once of a resolution of the Principal Allied Powers and of an *agreement* between the interested parties. It was taken in accordance with a common desire on the part of all concerned to arrive at a final settlement of the dispute between Poland and Czechoslovakia " (p. 29). In the opinion of the Court, the delimitation of frontier had been settled by the decision of July 28, 1920, which was to be regarded as definite and applied in its entirety. The Polish Government invoked in a contrary sense a declaration which it had made (Poland reckons firmly upon obtaining by way of exchange her frontier at Jaworzina), and which it interpreted as a cancelling condition attached to the consent expressed by the affirmative vote of the Polish Commissioner. The Court discussed this reservation, which implies that it would have admitted it if it had recognized it as valid ; but it decided that " the declaration seems rather to be in the nature of an expression of a mere expectation and not a condition in the proper sense of the term. But even supposing that the declaration was made with the intention indicated subsequently by the Polish Government, and that it could have been understood as such by the Commission, it does not appear that such a condition *expressed after the vote had been taken* could have been validly made, or could have been accepted as such by the Commission, the members of which were not in a position to take it into consideration when recording their vote " (*Advisory Opinion*, No. 8, pp. 52–3).

We shall have occasion later to raise, as regards the indivisibility of a supposed recognition of one of the parties, a new point of connexion with the question which interests us. For the moment I confine myself to pointing out that the Council, having thus in the Court's opinion the juridical basis of the recommendation which the Conference of Ambassadors had asked it to pronounce in this case, adopted it in a sense comformable to that opinion, and the representatives of the two interested parties *accepted* the solution thus rendered.

(*h*) The last dispute analogous to the Polono-Lithuanian dispute consists in the Mosul case which also for a long time engaged the Council's attention. Here also, owing to the importance of the territory in dispute, the question actually involved something more than a simple delimitation of frontier ; and, lastly—another point of analogy with the case which occupies us—the State which then held the disputed territory invoked the

de facto situation resulting from a military occupation—an argument which the Rapporteur of the Commission and the Council carefully refrained from retaining as a legal motive.

In this case, as in the one preceding, the Council asked the opinion of the Permanent Court of International Justice upon a particularly important point, seeing that it concerned nothing less than specifying the scope of the Council's powers. The Council prayed the Court to inform it " what is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne—is it an arbitral award, a recommendation, or a simple mediation ? " (*Advisory Opinion*, No. 12, p. 6).

The entire argumentation of the Court, in its reply to this question, turns on the point of ascertaining *whether the consent of the parties had been forthcoming*. The Court's opinion on this question should be quoted in its entirety ; there is hardly a page of the opinion that does not allude to this idea of the consent of the parties regarded as a requisite element of the Council's competence.[1] I will cite here only two essential passages of the opinion. The Court first recalls the text of Article 3, paragraph 2, of the Lausanne Treaty, thus worded : " In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations." It states that the Council, according to the Covenant of the League of Nations, is never regarded as exercising the functions of an arbitrator in the precise sense of the term ; it then adds (p. 27) : " Nevertheless, the Court holds that this fact does not prevent the Council from being called upon, *by the mutual consent of the parties*, to give a definitive and binding decision in a particular dispute."

" Though it is true that the powers of the Council in regard to the settlement of disputes are dealt with in Article 15 of the Covenant, and that, under that article, the Council can only make recommendations, which, even when made unanimously, do not of necessity settle the dispute, that article only sets out the minimum obligations which are imposed upon States and the minimum corresponding powers of the Council. There is nothing to prevent the parties *from accepting obligations and from conferring on the Council powers wider than those resulting from* the strict terms of Article 15, and in particular, *from substituting, by an engagement entered into in advance*, for the Council's

[1] Vide *Advisory Opinion*, No. 12, especially pp. 8, 11, 13–19, 23, 25–8.

power to make mere recommendation, the power to give a decision which, *by virtue of their previous consent*, compulsorily settles the dispute."

It is impossible more strongly to emphasize this necessity for the consent of the parties, recalled as many as three times in the same sentence. The Court recalls that there are also not lacking precedents in the sense of a power of decision exercised by the Council, owing to the preliminary consent of the parties, and it cites specially on this subject two cases that have been recalled, viz. those of Upper Silesia and Burgenland.

(*i*) These, then, are all the precedents that have occurred since the end of the War. To these precedents we may add the case with which we are concerned, and in which, up to the decision of the Conference of Ambassadors, the same principles were always applied. By the Moscow Treaty, the Government of the Soviets recognized Lithuania's sovereignty over the Vilna territory, just as by the Riga Treaty it recognized Poland's sovereignty over four former Russian provinces. The Suvalki Treaty, in relations between Poland and Lithuania, equally decides in favour of Lithuania. It does so in a provisional manner, but, in law, the solution which it gives remains in force, since this treaty was declared to be valid until the moment of a definite entente which has not yet taken place. The Allied Powers having considered the Riga Treaty as determining the frontiers between Russia and Poland, had no reason not equally to recognize the Moscow Treaty as determining the frontiers between Russia and Lithuania. There is thus no doubt that at the moment of the Suvalki Agreement, as regards both Russia and the Allied Powers and Poland herself, Lithuania simultaneously held *de facto* possession of, and legal sovereignty over, the Vilna region.

Numerous acts of the Council have recognized this situation. It will suffice to mention here the resolution of June 28, 1921, accepting as a basis the preliminary draft of M. Hymans, which left Vilna to Lithuania and ordered the withdrawal of General Zeligowski's troops; that of September 20, 1921, which recalled it in these terms: "In view of the fact that the Council, by its resolution of June 28, unanimously approved the draft scheme drawn up by M. Hymans, in agreement with the two Delegations, and was of opinion that this draft should lead to a definite agreement between Poland and Lithuania"; and finally, that which is at once one of the most important and the last in date before

the decision of the Conference of Ambassadors, the resolution of January 13, 1922, where the Council, confronted by the refusal of the Polish and Lithuanian Governments to accept its final recommendation of September 20, 1921, "takes note of these refusals, which, in accordance with Article 15 of the Covenant, put an end to the procedure of conciliation instituted by its resolution of March 3, 1921," and adds this precise observation: "It cannot recognize any solution of a dispute submitted to the League by one of its Members, which may be reached *without regard to the recommendation of the Council*, or WITHOUT THE CONSENT OF BOTH THE PARTIES CONCERNED."

Such is the last state of things in so far as the Council's decisions in regard to Lithuania are concerned, since which time it has not had occasion to pronounce on the subject. After the decision of the Conference of Ambassadors, the Rapporteur, M. Hymans, then President of the Council, confined himself to declaring that "as regarded the substance of the question—namely, the political question—that was no longer before the Council"; and the President of the Council, without any opinion having been expressed by the Council or himself on the decision of the Conference of Ambassadors, closed the debate with these words: "The President said that, as the Rapporteur had pointed out, the Council only had before it a progress report of the events which had recently occurred. It took note of this progress report without expressing any opinion, since there was no resolution before it." [1]

Still better, since that epoch a recent decision of the Council, dated December 10, 1927, has reiterated the maintenance of the *status quo* as it results from its previous decisions. We might almost detect in this a studied ignoring of the decision of the Conference of Ambassadors or even a refusal to recognize it in so far as it is at variance with the Council's own decisions. Seeing that this point is of great importance for our thesis, there are reasons for distinctly recalling how these matters stand.

During the discussions on the conflict between Poland and Lithuania, over the expulsion of eleven Lithuanians by the Polish Government from the Vilna territory,[2] the Polish repre-

[1] Report of the Sitting of Saturday, April 21, 1923, *Official Journal of the League of Nations*, June, 1923, 4th year, No. vi, Report of the 24th Session of the Council.

[2] Request dated October 26, 1927, on the subject of the expulsion of eleven Polish nationals into Lithuanian territory, *Official Journal of the League of Nations*, February 1928, p. 176 *et seq.*

sentative, at the sitting of December 7, 1927, alluded before the Council of the League of Nations to the decision of the Conference of Ambassadors of March 15, 1923, which he considered as "finally fixing the frontier between the two States and adopting as a basis the line of demarcation laid down under direction of the Council of the League"; and, on the strength of a phrase of the then Rapporteur to the Council, M. Hymans, it seemed to admit that "the Council of the League of Nations on its part regarded the question as settled."

But at the sitting of December 10 of the same year (1927), the Rapporteur, M. Beelaerts van Blokland, The Netherlands delegate, with an intention that could have been only to revert to the point of this assertion—since the expulsion affair had no relation to the decision of the Conference of Ambassadors which M. Zaleski had deemed it necessary to recall—inserted in his report the following sentence: "Although it appears to me almost superfluous to say so, it may perhaps be useful to note that the decision that I have in view would in no way affect a settlement of the various questions on which the two Governments have differences of opinion, and of which for the moment, I shall only mention the rights that the Lithuanian Government claims to have over the territory of Vilna." And his draft resolution, with no less clearness, concluded in this sense: "*The Council declares that the present resolution in no way affects questions on which the two Governments have differences of opinion.*" Now, this draft resolution was unanimously adopted, with the assent of MM. Zaleski and Voldemaras and the President's felicitations to the Rapporteur. We may then declare that the Council adheres, without in any way modifying it, to its decision already quoted, of January 13, 1922, in which it stated that: "It cannot recognize any solution of a dispute submitted to the League by one of its members, which may be reached without regard to the recommendation of the Council or WITHOUT THE CONSENT OF BOTH THE PARTIES CONCERNED."

We may, therefore, after all that has been recalled, assert in the clearest manner the necessity for the consent of the parties in order that a territorial dispute, even though bearing upon a simple rectification of frontier, shall be decided by an international organ; in this sense the entire unanimity of various international organs has been manifest, i.e. the Permanent Court of International Justice, the Council or Assembly of the League of Nations. Irrespective of the Vilna case, of all questions of

delimitation of frontier submitted to the League of Nations, the only case up to the present that has terminated unsuccessfully is the dispute relative to the frontier between Hungary and Yugoslavia. And the reason for this is precisely that, in that case, in contradistinction to the others, the Council, *lacking the indispensable consent of one of the parties*, had not received arbitral powers. So that from this standpoint this solitary failure of the League of Nations in a conflict of this character, as well as all the other cases in which it has succeeded, affords proof of the essential importance ascribed with good reason by international organs to this necessity for the consent of the parties, given, according as arbitration or mediation is involved, before or after the solution.

Another point of equally great importance is that, although these frontier questions have often been in themselves of secondary importance, none of them (except the Mosul affair) affecting truly national interests, nor even sometimes considerable local interests, the Council has nevertheless in these cases always pursued a regular procedure of such a nature as to permit the parties to present and freely to defend their cause. As is observed by the pamphlet on *The Political Activity of the League of Nations* (p. 92), published by the League's Information Section: " The typical features of the procedure followed by the Council in the settlement of these questions have been as follows: *hearing the case of both parties* who, in virtue of Article 4, paragraph 5, of the Covenant, have the right, if they are not members of the Council, to be represented on the Council when it is considering questions that particularly interest them; the conferences of experts, to which sometimes are added representatives of the Boundary Commissions under the chairmanship of a representative of the Council; consultation of the competent League authorities, such as the Permanent Advisory Commission on Military, Naval, and Air Questions for technical points, and the Permanent Court of International Justice for points of law."

We shall have to ask ourselves whether, from all these points of view, realization of the essential condition of consent of the assignor State, and also respect for the protective forms in which the decision ought to be rendered, the decision of the Conference of Ambassadors was not effected in a wholly abnormal manner at variance with all precedents?

I have considered it necessary to insist upon this point,

which is of the highest importance, and to treat it with care, rather than to revert at length to certain questions that will follow ; they have already been examined in detail by M. Mandelstam, with whom I am in complete accord.[1] The conclusion which appears indisputable in regard to the first point will then be that : According to general principles of international law and an international custom strong to such a degree that we cannot mention a single exception thereto in the course of numerous disputes of a territorial nature that have arisen since the War, no substitution of sovereignty is possible without the consent of the interested State.

II

Seeing that at the moment of the Suvalki Agreement Lithuania, as admitted by all—Russia, the Allied Powers, and Poland herself—was recognized to possess sovereignty over the Vilna region, and that, according to the most certain principles of international law recalled by the Covenant of the League of Nations, a State may not be deprived without its consent of territory belonging to it, the second question left for us to examine from the standpoint of positive law is therefore the following : Did the assignor State give its consent—universally recognized as indispensable—to the substitution of sovereignty effected in accordance with the terms of the decision of the Conference of Ambassadors ?

In other words, since Lithuania at that moment had legal possession, she could not be deprived of it during a fresh conflict with Poland following the occupation of Vilna by General Zeligowski, except by virtue of a juridical method of solution of that conflict. Now, practice and theory of international law are in agreement in admitting solely the following methods of juridical solution of conflicts, which all necessarily presuppose consent given by the States to the dispute, either before or after the solution. The methods of solution of conflicts recognized by international law are : judicial sentence, arbitral award, mediation properly speaking, and lastly, since the Covenant, a method midway between mediation and arbitration, which consists in the decision of a political body, like the Council, rendered competent by virtue of the acceptance of the parties,

[1] A. Mandelstam, *Conciliation internationale d'après le Pacte et la jurisprudence du Conseil de la Société des Nations*, pp. 224–55, 261–70, 278–96.

in order to decree supremely on the dispute. Let us quickly review these four methods.

(*a*) **Judicial Sentence.**—Lithuania is one of the States that have signed the optional declaration provided in Article 36 of the Statute of the Permanent Court of International Justice, whereby the States declare that, from this date "they recognize as compulsory *ipso facto* and without special agreement in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court," for legal disputes specified in Article 13 of the Covenant of the League of Nations. But such is not the case with Poland, who was not therefore bound and did not desire to make use of this option. The Government of the Lithuanian Republic formally proposed it to her after the cessation of the conciliation procedure before the Council, in a note from M. Jurgutis, Minister for Foreign Affairs of Lithuania, to M. Skirmunt, Minister for Foreign Affairs of Poland, dated June 20, 1922[1]; but the Polish Government declined this proposal in a telegram to the Lithuanian Minister for Foreign Affairs dated March 15, 1923.[2] Later, following the decision of the Council relative to the division of the neutral zone, the Lithuanian Government renewed its attempt, and offered to submit to the Permanent Court the question of the right of the Council to adopt in this case a recommendation and the carrying of the recommendation in the face of the other party's opposition. This was the object of a telegram of February 10, 1923, and of a letter of March 9, 1923, both addressed by M. Galvanauskas, President of the Council and Minister for Foreign Affairs of Lithuania, to Sir Eric Drummond, Secretary-General to the League of Nations.[3] No more effect was given to this proposal, so that the Permanent Court of International Justice has never had to legislate on the Polono-Lithuanian dispute. There is therefore no reason to insist upon the first method of solution.

(*b*) **Arbitral Award.**—Arbitration properly speaking is never compulsory in international public law. The Covenant of the League of Nations has not rendered it compulsory even for questions of a purely juridical character. Article 13 establishes it in reality among members of the League of Nations only in cases "whenever any dispute shall arise between them which

[1] *Lithuanian Yellow Book on the Vilna Question*, p. 308 *et seq.*

[2] *Ibid.*, p. 312 *et seq.*

[3] *Ibid.*, p. 365 *et seq.*

they recognize to be suitable for submission to arbitration or judicial settlement." Article 12 requires them simply, "if there should arise between them a dispute likely to lead to a rupture," to submit it "either to arbitration or to judicial settlement or to inquiry by the Council," and it is the latter method that was here adopted. There has never been concluded between Poland and Lithuania any general arbitration convention. We therefore fall back again upon the common law of arbitration, and for arbitration to have taken place a compromise was necessary between the two States, specifying a particular dispute. Not only has a compromise never existed in the case under review, but admitting that it was meant to assimilate to that compromise, the existence of which is necessary, the note of November 18, 1922, whereby Lithuania applied to the Conference of Ambassadors to determine the Polono-Lithuanian frontiers,[1] and that it was desired to regard that note as sufficing to set up the Conference of Ambassadors as an arbitrator of the conflict, it is clear that the consent of Lithuania exists only in the terms wherein it is given. Now, Lithuania invested it with formal reservations ; she asked the Allied and Associated Powers to be good enough "to use the right which Article 87 of the Versailles Treaty confers upon them, and to determine the eastern frontiers of Poland," but only "while taking into account the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania."

All the former arbitration treaties contained analogous reservations, specifying either the honour or the vital interests of the contracting parties. The arbitrator was of course bound by those reservations—that was exactly the inferiority of arbitration, as it was then understood—and if he did not take them into account his decision was null through exceeding his powers. Now, we are here confronted by precisely those formal reservations, by virtue of which Lithuania could except from arbitration the question of possession of the city demanded as her capital.

Moreover, the first reservation, which permitted the Conference of Ambassadors to decree only "while taking into account the solemn undertakings" of Poland towards Lithuania, was

[1] Note from M. Galvanauskas, President of the Council and Minister for Foreign Affairs of Lithuania to M. Poincaré, President of the Council, Minister for Foreign Affairs of the French Republic, President of the Conference of Ambassadors (*Lithuanian Yellow Book*, p. 582 *et seq.*).

such that we may reasonably say that it forbids us to suppose that Lithuania wished to accept the Conference of Ambassadors as an arbitrator. In reality, this formal reference to respect for the clauses of the Suvalki Treaty was equivalent to demanding that the Conference of Ambassadors should recognize Lithuania's possession of Vilna, owing to Poland's solemn undertakings, i.e. the Conference was rather asked, in the Lithuanian Government's mind, to state a legal situation, declared by it to be intangible, than to deliver an arbitral award upon a dispute in which the two parties accepted in advance the solution to be rendered.

Lastly, in the opinion of all the jurists of international law that have pronounced on this question, procedure by default is impossible in international arbitration, owing to the optional character of the arbitration.[1] The Conference of Ambassadors, which did not even summon Lithuania and ruled without hearing her, could not therefore be regarded as invested with the power of an arbitrator; otherwise it would have violated all the rules of positive law and of equity which are imposed upon the person or body entrusted with such a mission.

(*c*) **Mediation.**—Mediation, in the proper sense of the term, consists in the amicable intervention of a third party with a view to terminating a dispute between two States by a friendly arrangement. Mediation and good offices "have exclusively the character of advice, and never have binding force" (Article 6 of The Hague Convention on the Pacific Settlement of International Disputes). This, in the Lithuanian Government's mind, was really the scope of the *démarche* which it addressed to the Conference of Ambassadors, and therein lies the explanation of the reservations made in the note of November 18, 1922, which would be inexplicable if the matter concerned arbitration. The solution proposed by the mediator bears the character only of a project; its entire binding force therefore rests in the acceptance of the parties. Such is the criterion of distinction between mediation and arbitration which is universally admitted, not only by all jurists of international law, but also by all international agreements, conventions for the pacific settlement of international conflicts, of the first and second Hague Conference, Bryan pre-War treaties and post-War conciliation treaties. And, of course, the acceptance of the parties ought to be given, for each of them in the forms provided by its constitution,

[1] *Vide* especially N. Politis, *La Justice internationale*, p. 86.

i.e. most frequently, when a cession of territory is in question, with the adhesion of the national representation. This is the case with Lithuania, whose Parliament had never been consulted.

It is clear that if Lithuania, when she applied to the Conference of Ambassadors, had actually entertained the idea of accepting it as mediator, such was not the intention of the Conference, seeing that its decision was rendered as having intrinsic binding force, irrespective of Lithuania's consent ; and, in fact, not only was this consent never obtained, but upon various occasions, and notably through the note of April 16, 1923, addressed by the Lithuanian Minister for Foreign Affairs to the President of the Conference of Ambassadors, the Government of the Lithuanian Republic declares that " to this decision it is bound to oppose the most energetic protest " (*Lithuanian Yellow Book*, p. 378).

(*d*) **Arbitration-mediation of a Political Body.**—There remains then as the last possible solution the midway method between mediation and arbitration, properly speaking, which consists in the decision of a political body, like the Council of the League of Nations, rendered competent by virtue of the acceptance of the parties to legislate supremely on the dispute. In the case of this new method of a pacific solution of conflicts, when the Council intervenes, may it not be said to possess special powers ? May it not be regarded as combining a mediator's freedom of action with the binding force of an arbitral award ?

We should carefully note at the outset that, in the opinion of all, even in this particular case, the Council figures always either as an arbitrator or a mediator, but not as invested, in the Covenant itself, with a right of sovereign decision. The League of Nations is not a super-State, and none of its organs has the right on its own authority to adopt a decision to be imposed upon States in litigation.[1] But an extension of the authority which the Council holds normally from the Covenant is possible by virtue of the consent of the parties. What, then, is the particular scope of the decision of the organ before which this special case was laid for arbitration-mediation ? The question was elucidated in regard to the Council on the occasion of the

[1] Reservation, of course, made of the competence of the Permanent Court for States that have signed the optional clause specified by Article 36 of its statute ; but if the Permanent Court is here competent, it is by virtue of the consent given in advance by the signatory States.

Mosul case. In that case, and in so far as it was submitted to the Council with a demand for an interpretation of Article 3, paragraph 2, of the Lausanne Treaty, the Permanent Court has rendered an opinion of capital importance as regards the rôle of the Council and the scope of its decision (*Advisory Opinion*, No. 12). May this opinion be applied *mutatis mutandis* to the decisions of the Conference of Ambassadors, when the latter is accepted as an arbitrator in a conflict ? What may appear to authorize a certain assimilation is the fact that it constitutes, like the Council, not an arbitral commission, properly speaking, but a political body. It is then possible, in a strict sense, to apply thereto certain of the deductions which the Permanent Court draws from this idea in regard to the competence of the Council accepted as arbitrator. It is evidently the maximum of right that can be recognized for the Conference of Ambassadors, in some respects a reduction of the Council, since it comprises only a portion of the members who form the latter. It is clear that it cannot claim to exercise a greater competence and more extended rights than the Council, an international organ whose powers, recognized by a solemn treaty, are imposed upon all the members of the League of Nations, while the Conference of Ambassadors cannot in any way claim that character.

Let us then see what was the solution given by the Permanent Court relative to the competence of the Council. We shall learn that if, owing not only to the nature of the political body of this organ, but also through application of certain articles of the Covenant, the Permanent Court deemed itself able, in what concerns it (the Council), to extend somewhat the ordinary conception of arbitration, the most favourable solution that one may adopt for the Conference of Ambassadors is to declare this same extension applicable to it. This solution is even already doubtful in law, since the texts of the Covenant specified by the Court are applicable only to the Council and not to the Conference of Ambassadors. In any event, therefore, this is the maximum of competence to which it can lay claim in a case of this nature.

Now, what was the solution given by the Permanent Court to this question of the extent of the powers of the Council ? The Court's reply admits of two distinct parts:

The first consists of an examination of the intention of the parties, regarded as essential. In the case submitted to the Court, this intention was manifested in Article 3, paragraph 2,

of the Lausanne Treaty, which here constituted the legal tie between the parties: " In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations." " The Court must therefore," says the *Opinion*, " in the first place endeavour to ascertain from the wording of this clause what the intention of the contracting parties was; subsequently, it may consider whether—and if so, to what extent—factors other than the wording of the Treaty must be taken into account for this purpose " (*Advisory Opinion*, No. 12, p. 19).

The entire first part of the Court's argument is devoted to proving that, in the Court's opinion, when signing this Article 3, paragraph 2, of the Lausanne Treaty, and in the event of no agreement being reached between them, " the intention of the parties was, by means of recourse to the Council, to ensure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier " (*Ibid.*, p. 19).

We shall shortly examine in what degree one may consider that Lithuania has given—an essential act—her consent to the competence of the Conference of Ambassadors. For the moment let us follow the advisory opinion of the Court in its second part, where, interpreting the texts of the Covenant, the Court determines the competence of the Council in cases where, by virtue of the parties' consent, it is accepted as arbitrator in a dispute. The Court declares (p. 26) that arbitration, in the limited sense of the word, has " for its object the settlement of differences between States by *judges* of their own choice and on *the basis of respect for law* " (Hague Convention for the Pacific Settlement of International Disputes, dated October 18, 1907, Article 37). It is also the sense in which Article 13 of the Covenant accepts this term of arbitration. But " it is impossible, properly speaking, to regard the Council, acting in its capacity of an organ of the League of Nations, as will be hereinafter described, as a tribunal of arbitrators." According to the Covenant " the Council, whose first duty is to dissipate or settle political disputes, is never considered in the Covenant as exercising the functions of arbitrator within the meaning of this article " (p. 27).

We are therefore here concerned only with arbitration in the wide sense of the word, " characterized simply by the binding force of the pronouncement made by a third party to whom the

interested parties have had recourse" (p. 26); and in this sense, the Council may be decidedly "called upon, by the mutual consent of the parties, to give a definitive and binding decision in a particular dispute" (p. 27). The Council's recommendations, which, in the terms of Article 15 of the Covenant, are made unanimously, do not compulsorily decide the dispute; they constitute only the minimum of the obligations which this article imposes upon the States. But "there is nothing to prevent the parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15, and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settles the dispute" (p. 27).

The Court therefore distinguishes between the recommendation which, in the terms of Article 15, paragraph 6, of the Covenant, possesses only "a limited binding effect," and arbitration, alone contemplated by Article 13 of the Covenant, and which consequently alone also admits the undertaking of the members to carry out in full good faith the award rendered, and, otherwise, the possibility of compulsory fulfilment (Article 13, last paragraph). This arbitration may be confided to the Council, which then exercises two distinct attributes. In the first place it possesses, in the terms of the Covenant, the quality of mediator, that is to say, it may take its stand not only upon the ground of law (or of equity, in the absence of a rule of positive law), but also upon that of opportunity, and, by virtue thereof, propose the solution which seems to it the most likely to conciliate the two States, should it be by means of concessions foreign to the object of the conflict, since the mediator, by the very fact itself that he only *proposes*, is not bound—in contradistinction to an arbitrator—by the terms of a compromise which he may not exceed under penalty of legislating *ultra petita*.

The Court very accurately declares that "in agreeing to refer the dispute to the Council of the League of Nations, the parties certainly did not lose sight of the fact that the powers of mediation and conciliation form an essential part of the functions of that body." But "if such procedure fails, the Council will make use of its power of decision" (p. 28).

In this case, therefore, two stages in the Council's action should be distinguished; but the second stage exists only where

the parties have desired, when giving the Council the power of decision, " to complete the functions which it normally possesses under Article 15 of the Covenant " (p. 28). In the formal opinion of the Court, it is clearly therefore the consent of the parties, and not the Covenant, which gives the Council the right to rule by a compulsory award in a given dispute.

I have insisted upon this opinion of the Permanent Court because it constitutes the key to the difficulty; putting the most favourable construction upon matters, i.e. granting the Conference of Ambassadors the same enlarged competence as the Council—it evidently cannot possess more rights than the latter—it may still enjoy it only, like the Council itself, under a necessary condition, which is that the parties shall have conferred upon it this particular competence.

If, now, we set aside the three first methods of juridical solution of conflicts, a judicial sentence, an arbitral award, and mediation, properly speaking, which are all excluded by the circumstances in which the dispute submitted to our examination arose, there remains solely the fourth method, the sovereign decision of a political body rendered by virtue of the preliminary consent of the parties, which is a necessary condition, seeing that there does not exist any super-State organ whose decisions may be imposed upon States over and above their will. It is this method that the Conference of Ambassadors claimed to employ, and it is in fact that through which the organ concerned possesses the most extensive powers, since, on the one hand, it operates with the liberty of action of the mediator and, on the other, its award possesses the binding force of an arbitral award. We must therefore refer to the decision of the Conference of Ambassadors and examine it closely. We shall have to ask ourselves whether, from the standpoint of the indispensable element of enlarged arbitration—the consent of the parties—and observation of forms essentially to be respected, the decision of the Conference of Ambassadors embodies the conditions recognized as necessary by the opinion of the Permanent Court, even in the particularly favourable case where the Council of the League of Nations combines the appropriate powers, which it holds from the Covenant, with the consent of the parties ?

In this examination of the right of the Conference of Ambassadors to rule by a sovereign decision—since this is what it claims to do instead of confining itself to the rôle of a mediator which it was Lithuania's intention to confer upon it—the essential

point is therefore to ascertain whether or not it has acted with the consent of the parties.

The essential point is admitted by the Conference. In its first preamble it invokes Article 87, paragraph 3, of the Versailles Treaty, in the terms of which it pertains to the Principal Allied and Associated Powers to determine the frontiers of Poland which were not specified by that treaty. But the Versailles Treaty, like the Treaty of Saint-Germain quoted farther on, can obviously be valid only for the Powers that have signed it, among which is Poland, but not Lithuania. The sole question that arises is therefore to ascertain whether Lithuania gave her consent after the event. The question was, moreover, very well put by the Conference. After having invoked Article 87 of the Versailles Treaty, it quotes the request (*request*, not *adhesion*, since the latter was needless for Poland by virtue of Article 87) addressed by the Polish Government to the Conference of Ambassadors, " tending to see the Powers which are represented therein make use of the rights which the said article confers upon them." [1]

And the third preamble is thus worded: " Whereas on its part, the Lithuanian Government has already, by its note of November 18, 1922, shown itself anxious to see the said Powers make use of the said rights." Everything therefore rests upon this note of November 18, 1922. On the admission even of the Conference of Ambassadors, it is through that note that the Lithuanian Government gave this indispensable assent to render the Conference competent in relation to a State non-signatory to the post-War treaties.[2]

[1] The decision of the Conference of Ambassadors is reported in the *Lithuanian Yellow Book on the Question of Vilna*, pp. 379–82.

[2] Two other acts from which would proceed Lithuania's consent have been invoked, not by the Conference of Ambassadors, but by M. Hymans in his report to the Council of the League of Nations (sitting of April 21, 1923, *Official Journal of the League of Nations*, June 1923, pp. 582–4). It is at first a declaration made to the Council by the delegate of Lithuania, M. Naruševičius (sitting of January 13, 1922, *Official Journal of the League of Nations*, February 1922, *Procès-verbal of the 16th Session of the Council*, Annex 295 (d), pp. 138–9), and in the second place a declaration made three months later, on May 17, 1922, also to the Council by the Lithuanian delegate, M. Sidzikauskas. Both those declarations, which may be compared with a note addressed about the same time, April 8, 1922, by M. Jurgutis, the Lithuanian Minister for Foreign Affairs, to M. Hymans, President of the Council of the League of Nations (*Lithuanian Yellow Book*, p. 319), beg the Council of the League of Nations to draw the attention of the Supreme Council of the Allied and Associated Powers to the urgency of laying down Poland's eastern frontiers (the first suggested that the Lithuanian Government

What, then, is said in the note of November 18, 1922, addressed by M. Galvanauskas, President of the Council and Minister for Foreign Affairs of Lithuania, to M. Poincaré, President of the Council, Minister for Foreign Affairs, and President of the Conference of Ambassadors ?

The Lithuanian Minister for Foreign Affairs, replying to the observations which had been made to his Government on the subject of the obstacles that it had raised to navigation on the Niemen, declares that " these abnormal relations are the consequence of Poland's failure in her undertakings towards the League of Nations and also towards Lithuania." He recalls the censure addressed by M. Léon Bourgeois to the Polish Government on the occasion of the occupation of Vilna, effected contrary to the Polono-Lithuanian Agreement of Suvalki, which "has not hitherto been replaced by any international act," and he concludes: " Consequently, the Lithuanian Government can but declare once more that the regime of navigation on the Niemen, instituted by the Versailles Treaty, a regime which it accepts without the slightest reservation, will receive its application as soon as Poland, who, notwithstanding her solemn undertakings towards Lithuania, at present holds Lithuanian territories, shall have honoured her undertakings towards Lithuania, and shall thus have permitted the Lithuanian Government to contract with her relations of peace and amity.

" To this declaration the Lithuanian Government wishes to add that it would be particularly grateful to the Allied and

would equally agree to entrust the solution of the Vilna conflict either to the Permanent Court of International Justice or to an arbitration tribunal) ; but the first of these declarations expressly indicates, as the motive of the Lithuanian Government's refusal to consent to the division of the neutral zone, its fear lest such consent should be interpreted as a renunciation of its rights to Vilna, which are thus once more placed beyond the discussion. The second declaration, still more expressly conditional, subordinates the Lithuanian suggestions to submit to the decision of the Allied Powers to " the fulfilment by Poland of the Suvalki convention." These two declarations, by the express reservations which they formulate, cannot, any more than the note of November 18, 1922, be regarded as an unconditional submission of Lithuania to the decision of the Allied Powers. An express reservation and unconditional submission are evidently contradictory conceptions. It seems to me not worth while to discuss the purport of these two declarations, seeing that M. Mandelstam has done this at length at the commencement of his opinion relative to the same dispute, and seeing also, that, as I have already said, the decision of the Conference of Ambassadors has not alluded to them. I shall therefore confine myself to the discussion of the only act of the Lithuanian Government upon which the Conference relies—the note of November 18, 1922.

Associated Powers if, with a view to hastening the advent of the era of peace and amity between Lithuania and Poland, those Powers would avail themselves of the right which Article 87 of the Versailles Treaty confers upon them, and determine the eastern frontiers of Poland, *in taking account of the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania.*" [1]

In the presence of such formal reservations, there is no reason to ask whether the Lithuanian Minister for Foreign Affairs had authority to bind his country, in spite of the text of the Constitution requiring the approval of Parliament for any cession of territory, and that was a consequence the possibility of which emanated directly from such a compromise. But it will suffice to read the note to see that it is precisely that consequence which is clearly rejected. I confine myself to recalling the discussion of those reservations already conducted on the occasion of arbitration ; it is equally valid for a method of solution which confers still greater rights upon a political body invested with authority to adopt a sovereign decision and which, in that way, entails still more risk upon the State which should give its consent without reservations. Here Lithuania has given her consent, but accompanied by reservations as formal as possible.

One might say that under these conditions she refuses true arbitration and still more the enlarged form known as arbitration-mediation. That is perfectly correct, but such is actually the situation which results from the facts. An indisputable rule of law forming part of the general principles of law recognized by all States [2] is the principle of the indivisibility of the offer or the admission. It is obvious that we may not divide an offer from the opposite party, taking therefrom that which is favourable to us and rejecting the rest. This is what the Permanent Court of International Justice declares on the subject of the agreement between Poland and Czechoslovakia in the Jaworzina affair: "The nature of such an agreement implies that the parties entered upon negotiations

[1] *Lithuanian Yellow Book*, pp. 383–4.

[2] "By general principles or principles of justice we mean those that are deduced from the law in force and norms of reason and justice recognized as necessary to regulate the relations among States" (Motion on the Rights and Duties of States presented by the Peruvian Delegation at the Pan-American Conference of Havana, February 1928. *Europe nouvelle*, May 5, 1928, p. 633).

with a free hand, but without giving up their respective legal standpoints." [1]

The question therefore cannot be open to doubt. The consent of Lithuania—and more correctly still of the Lithuanian Government alone, not of the national representation—has been given, but with formal reservations. A question of good faith is involved. The consent may be regarded as null and void, or, if it is accepted, it should be adopted with the reservations attaching to it. If those reservations are such as to destroy the competence of the Conference of Ambassadors as an arbitral commission, in the ordinary sense of the word, and with even greater reason for purposes of enlarged arbitration, the fact can only be stated. The most elementary juridical principles are opposed to a course in which, with a view to extricating oneself from troublesome reservations, one goes beyond the consent as formally enunciated by the party to the case.

I will add only a word in regard to the respect for protective forms incumbent upon the arbitrator. We have already declared that an arbitral award may never be rendered by default; with stronger reason is it radically vitiated if the absence of one of the parties is due to the fact that he has not even been summoned. Each party obviously possesses an absolute right to be heard under the same conditions as the other. This principle of respect for equality is carried so far and rightly so, that, in the Council of the League of Nations, when one of the States involved in the dispute alone is represented, the other is instantly summoned to take a seat for the duration of the case. In this case, moreover, there is involved one of those general principles emanating simultaneously from positive law and equity, which are alike incontestable and uncontested. Their non-observance in itself seems to indicate that the Conference of Ambassadors did not wish to act as arbitrator and to rule by virtue of the consent of the parties. But in what capacity then could it act, since it is evidently not the organ of a super-State, and since, by its own admission (third preamble), it appears to recognize, as M. Hymans, the Rapporteur of the Council did later, that Article 87 of the Versailles Treaty is, in the absence of their consent, inapplicable to non-signatory States?

[1] *Advisory Opinion*, No. 8, p. 55. See also that which has been said *supra*, in the same case, of the reservations alleged by Poland, which the Court rejected because they were *subsequent* to the agreement. It would seem, however, from the motive of rejection, that the Court would have recognized those reservations if they had been made in good time.

The Conference of Ambassadors has felt the weakness of this first argument, so it immediately invokes another, viz. the *de facto* situation: "Whereas, as regards her frontier with Russia, Poland has entered into direct relations with that State with a view to determining the line;

"Whereas, as regards the frontier between Poland and Lithuania, there is cause to take into account the *de facto* situation resulting especially from the Resolution of the Council of the League of Nations of February 3, 1923." [1]

The first part of this preamble runs directly counter to the very object of the decision. The Conference recalls that, as regards the line of her frontier with Russia (Riga Treaty of March 18, 1921), Poland has entered into direct relations with that Power. This can be only in order to take note of the fact, and to state that, by the fact of the Russo-Polish Treaty, the frontier between the two States is henceforth determined. But if the Soviet Government is qualified to surrender a portion of the territories belonging to the former Russia, why could not the Conference of Ambassadors equally take into account the Moscow Treaty of July 12, 1920, whereby the same Government conceded to Lithuania the Vilna territory which also formed part of the former Russia? In both cases we are confronted by the same legal situation, and there can be no reason for not recognizing the Moscow Treaty as well as the Riga Treaty.

But the continuation of the preamble is still more open to criticism. The Conference of Ambassadors invokes the *de facto* situation resulting especially from the resolution of the Council of February 3, 1923. If the Conference abandons the ground of law in order to take its stand upon that of fact, there is nothing more to say except that it is difficult to follow it on to that ground. If, on the contrary, as one must assume, it remains upon the ground of law, this passage can only mean one thing, which is that the Conference is referring to the Council's earlier resolution. Now, if we revert to that resolution, we see that the Council did not adopt any definite decision; its recommendation had only a clearly provisional scope. It was indeed worded as follows:

The Council, "in view of the necessity of ending as soon as possible the state of disorder and insecurity at present prevailing in these zones, which were in the first place established on the

[1] *Lithuanian Yellow Book*, p. 380.

initiative of the Military Commission of Control and by the authority of the Council;

"Makes the following recommendation:

"That as from February 15 next, the two Governments concerned shall each have the right to establish their administrations in the parts of the neutral zones defined as follows (a description of the delimited portion follows);

"The demarcation thus laid down (see Annex 461a) shall retain the provisional character referred to in the Council's recommendations of January 13 and May 17, 1922, and the territorial rights of both States shall remain absolutely intact" (*Official Journal of the League of Nations*, March 1923, *Procès-verbal of the 23rd Session of the Council*, pp. 237–8).

The Council's resolution really created a state of fact, necessary, as is pointed out, to put an end to the condition of disorder and insecurity in which the zones were involved; but precisely because the question concerns a state of fact, the Council has been careful to specify that this state is *provisional, and that the territorial rights of the States remain absolutely intact.* It is thus impossible to claim to find here the basis of a definite juridical solution without running counter in the clearest manner to the Council's formal intention. To rely upon a resolution expressly declared to have only a provisional scope, and to set out from there to create a definite situation, is to perform an inexplicable kind of transmutation, and in reality make this decision say the opposite of what it intended.

The Council having decided nothing definitely, the decision of the Conference of Ambassadors, in so far as it refers to itself, may still less possess a definite character, unless of a kind of substitution which cannot be explained. And we know that neither before nor after the intervention of the Conference did the Council adopt a definite decision. It confined itself, as we have seen, to taking note of this intervention: "The President said that, as the Rapporteur had pointed out, the Council only had before it a progress report of the events which had recently occurred. It took note of this progress report, without expressing any opinion, since there was no resolution before it."

As a matter of fact, the only resolution of the Council of a definite character is that of January 13, 1922, already cited, in which it declares that "it cannot recognize any solution of a dispute submitted to the League by one of its members, which may be reached without regard to the recommendation

of the Council or without the consent of both the parties concerned."

This recommendation of the Council, voted unanimously, has retained all its validity. By virtue of Article 15, paragraph 6, of the Covenant, once accepted by one of the parties, it shall be imposed upon all, since "the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." We see that, if we admit the validity of the decision of the Conference of Ambassadors, in case Lithuania should accept the Council's decision of January 13, 1922, which she has always the right to do, we should find ourselves in a veritable impasse, confronted by two irreconcilable solutions!

It is true that by the word "especially" (*notamment*) the Conference of Ambassadors seems to allude to other elements of fact. Which? We can see but one, since the Council's recommendation is an element of law and not of fact. The great element of fact here is the occupation of the Vilna territory by the troops of General Zeligowski on the day following the Suvalki Agreement. Does the decision of the Conference of Ambassadors refer to this element? If so, this would be a subversion of international law; it would be a literal application of the maxim that might excels right. To invoke a "situation of fact" as the basis of a juridical decision is especially grave when this means to run counter to an earlier well-defined juridical situation.

Now, we know that such was the case for Lithuania in her relations whether with Russia, since the Moscow Treaty, or with Poland, since the Suvalki Agreement, or with the Allied Powers. We recall the Polish Government's formal disavowals on the morrow of General Zeligowski's *coup de force*, regarded as "a flagrant violation of military duty, which cannot in any way be admitted." [1] Some days later the Polish Government added that it "regrets that the insubordination arising from the troops commanded by General Zeligowski should have disturbed the general desire to terminate the Lithuano-Polish dispute in an amicable manner." [2] In his report to the Council of the League of Nations, M. Léon Bourgeois, who was then President of the Council, after having recalled the Polish Government's disavowal,

[1] Polish Government's declaration of October 14, 1920, reproduced in *Lithuanian Yellow Book*, p. 95.

[2] Polish Government's declaration of October 19, 1920, reproduced in *Lithuanian Yellow Book*, p. 96.

pronounced these grave words: "The question now at issue is not indeed merely the determination of the rights and obligations of each of the two Governments concerned, but it is that of the right which belongs to the Council of the League of Nations not to tolerate any disregard of the decisions which it has taken nor to allow the result of proceedings upon which it has entered, after a formal agreement concluded in its presence between the two parties concerned, to be nullified. This is a question of vital importance for the future of the League, and it requires the most serious consideration on your part" (*Lithuanian Yellow Book*, p. 107). And the Council, in conformity with its Rapporteur's conclusions, in its Resolution of October 28, 1920, took note of "the solemn declarations whereby the Polish Government disavowed General Zeligowski's enterprise and declared him a rebel."

There is thus no doubt on what was the juridical situation before General Zeligowski's *coup de force*. Did this *coup de force* suffice to turn the juridical situation in favour of the occupant? When an analogous question was submitted to it in the Mosul conflict between Turkey and Great Britain, in which the latter invoked also a military occupation and the rights of a conqueror, the Council of the League of Nations was better inspired than the Conference of Ambassadors in replying through its Rapporteur that since Turkey had not renounced her sovereignty in favour of any other Power, "the Commission is of the opinion that from the legal point of view the disputed territory must be regarded as an integral part of Turkey until that Power renounces her rights."[1] There can indeed be no doubt that an opposite solution would be the negation of international law.

If, then, we set aside this argument drawn from the "situation of fact," equally untenable in law, that it refers to the earlier decision—purely provisional—of the Council, or to General Zeligowski's *coup de force*, the conclusion of this first part of the discussion, from the standpoint of positive law, is therefore that in this matter of the delimitation of frontier—more especially when it implies not a simple regularization without importance, but a cession of territory—nothing may be done without the consent of the interested States, either after the

[1] The Question of the Frontier between Turkey and Iraq. Report presented to the Council by the Commission of Inquiry constituted by virtue of the resolution of September 30, 1924 (p. 88). The Council unanimously declared in favour of adopting the motives and proposals affirmed in its committee's report.

decision, in case of mediation, or previously, in case of arbitration. Now, here this consent to a sovereign decision adopted by an arbitrator or political body has never been obtained, as regards Lithuania, either before or after the decision ; on the contrary, the latter has evoked only " energetic protests."

In positive law the consequence seems to me clear. There has been neither arbitration nor a sovereign decision, because the Conference of Ambassadors did not receive the necessary powers to rule thus. Neither has there been mediation, because the Conference did not follow that path. In other words, the Conference of Ambassadors, which would have been able to act as mediator, as Lithuania asked it to do, did not do what it could do, and, on the contrary, chose to do that which it had no right to do, so that in law the solution is not valid. Tainted with excess of power it is radically null, lacking as it does an element essential to any arbitral decision, in the wide as in the narrow sense of the word, viz., the consent of the parties in the case.

II

STANDPOINT OF EQUITY

In a certain sense the idea of equity is universally admitted, and actually equity is merely the application of the general principle of justice to a particular case. From the moment that we admit the idea of justice, we may not reject equity. Now, law is the basis of justice. There will not be found in domestic law a legislator who does not claim that the laws which he imposes are in conformity with justice. This conformity with justice exists *a fortiori* for the rules of international law. Precisely because there is no competent organ to enforce it with supreme authority, international law in relation to the idea of justice is still more dependent than domestic law.

Unfortunately the idea of equity has been obscured by a divergence that has taken place between Anglo-Saxon countries and Continental Europe. For the Anglo-Saxons, who are great formalists, equity is a conception more moral than juridical, so that in principle the ordinary tribunals, created for the application of positive law, are not required to take it into consideration. This fragmentary conception, which apportions the law between

the fundamental rules that inspire it and the positive form that clothes it, has led the Anglo-Saxons to create alongside their tribunals, properly speaking, Courts of Equity designed to repair the injustices which a too formal application of positive law may have entailed.[1]

It would seem that it was in this sense that the word equity has been adopted by Article 38, last paragraph, of the Statute of the Permanent Court of International Justice: "This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto."

This interpretation is, moreover, uncertain, since this article uses not the expression "equity" itself, but the Latin term "*ex æquo et bono*," and this idea of *good*, which it brings in, shows that it takes its stand upon a ground no longer only juridical but also moral. The word equity should then be accepted here in a very special sense. In this sense the judge may rule for the best (*au mieux*), i.e. without taking into account the positive law, he shall do that which the legislator would be able to do, who is not bound by the obligation to respect the earlier laws. It is precisely for this reason that the consent of the two States is required for the application of the *æquum et bonum* thus understood. And this is very natural, since the small States, which have confidence in their rights and for that reason do not hesitate to have recourse to the Permanent Court or to arbitration, might fear to see intervene, in the name of the best, alongside juridical considerations other considerations, of expediency, for example, which might cause the balance to incline in favour of the powerful States. In a system of equity thus understood, the consent of the States in dispute would therefore appear very prudent and even necessary.

In the continental conception, on the contrary, we perfectly comprehend the futility of this reservation. Equity is incorporated with the law: we would not understand a law voluntarily inequitable. The positive law implies a presumption of justice, and the judge or the arbitrator is there to apply it in that manner, i.e. with equity, in the particular cases that are submitted to him. Where a too narrow application, for example,

[1] V. Lévy-Ullman, *Éléments d'introduction à l'étude des sciences juridiques*, II. *Le système juridique de l'Angleterre*, 1re *partie*, *Equity*, p. 341 *et seq.*; and especially pp. 467–72, 497, 562–654. The distinction between the ordinary tribunals and the Courts of Equity is to-day very slender, and one may note a marked tendency to the fusion of the rules that govern them in favour of a *rapprochement* between the two systems, Anglo-Saxon and continental.

the predominance of the letter over the spirit of the law, would lead to an unjust solution—when the law is not formal and can receive another interpretation—it is that equitable interpretation which the judge shall give precisely because it is alone supposed to conform to the legislator's will. Under this system, the judge or arbitrator may not, in the name of equity, go against a formal positive law—otherwise there would be juridical anarchy—but he may either interpret the law in a manner most in conformity with equity, when it is obscure, or complete it, in case of lacunæ, thanks to this idea of equity.[1] This idea is very well conveyed by Article I of the Swiss Civil Code, which provides that " in the absence of a clear rule of positive law, the judge shall pronounce according to the rules that he would establish if he had to act as legislator."

This difference of conception in the idea of equity—sometimes forgotten, which explains why confusion arises—inevitably involves differences in the applications that are made of it. But it is easy to see that, in whichever of these two senses the term equity may be accepted, it is impossible to invoke it to explain the decision of the Conference of Ambassadors ; which, on the contrary, has clearly violated equity to the detriment of Lithuania.

If we accept equity in the Anglo-Saxon sense, permitting one in certain cases to go against the positive law in order to obtain a solution more in conformity with justice, international law also allows one to act in this manner ; but, for motives easily explained and without which the States in general and more particularly still the small States would no longer dare to resort to international justice or to arbitration, it allows one to do so only with the consent of the parties to the dispute. Now, we know that here the consent of Lithuania has never been obtained. Even when she has applied to one of these international organs which, like the Council of the League of Nations, a body more political than jurisdictional, can take its stand upon another ground than that of positive law, she has always qualified her acceptance with formal reservations which clearly implied that

[1] Cf., in this sense, del Vecchio: "Those principles having an ideal and absolute character whereby they virtually surpass the fixed system to which they are applicable, may not prevail against the special rules which compose it nor in any case destroy them ; but they are rated, on the contrary, above those rules, because they represent the highest reason and animating spirit thereof." See also J. Spiropoulos (who reproduces the preceding passage from del Vecchio, *Die Rechtsgrundsätze im Völkerrecht*, p. 71).

she consented to be judged only on the ground of law, and not on that of politics or expediency, which, not without reason, she deemed dangerous for her.

If, on the contrary, we accept equity in the sense of the continental nations, equity, without going against a formal positive rule—here against a treaty—may be invoked with a view to a better concrete application of the idea of justice, in order to clear up, in the sense of greater justice, certain obscurities or lacunæ of the positive rule.

Now, was this the case in the conflict under review? It will suffice to put the question in order to see that it admits of a negative reply. We have seen that there exist protective forms which are closely connected with the substance of law; they are justly regarded as constituting an essential guarantee thereof, without which the decisions rendered would suffer from a too legitimate suspicion and could not be considered valid. Now, these essential forms have not been in any way respected in the case under review. The decision of the Conference of Ambassadors appears exactly as though they had never existed, and there had been no reason for taking them into consideration.

Equity might be invoked with a view to increasing the efficacy of these protective forms in a case where they do not suffice to guarantee a satisfactory solution. In a general way its object is to allow the judge to press harder the solution that justice demands should be adopted. It is unprecedented that it should be invoked in order to frustrate a portion of the essential guarantees to which a party has right: its requisition by the judge or arbitrator, its right to a contradictory discussion, above all, if one of the parties is heard and not the other. It is unprecedented also that it should be invoked in order to make triumph a "situation of fact" against the legal situation; and the very simple reason of it is, that it intervenes precisely in the contrary case, so as better to assure the success of law in certain situations of fact that would render more difficult the realization of justice. To invoke equity to assure the triumph of the stronger or of the *de facto* possessor against the party that invokes a legal situation would be as contrary to reason as to justice. And that is exactly what would occur if, for want of positive law which we have seen to be adverse to it, one invoked equity in favour of the decision of the Conference of Ambassadors.

For all these reasons, I am of opinion that to the question submitted—"In law and equity, is the Government of the

Lithuanian Republic bound by the decision of the Conference of Ambassadors of March 15, 1923, concerning the frontiers between Poland and Lithuania ? " there are grounds for replying without hesitation: **No, in positive law as in equity, Lithuania is not bound by the decision of the Conference of Ambassadors adopted on March 15, 1923.**

L. LE FUR.

CONSULTATION

of

M. ANDRÉ MANDELSTAM

Doctor of International Law of the University of Petrograd, Member of the Institute of International Law

THE undersigned jurisconsult, Doctor of International Law of the University of Petrograd, Member of the Institute of International Law, former Director of the Juridical Department of the Ministry for Foreign Affairs of Russia, consulted by the Government of the Lithuanian Republic on the following question—"**In law and equity, is the Government of the Lithuanian Republic bound by the decision of the Conference of Ambassadors, of March 15, 1923, concerning the frontiers between Poland and Lithuania?**" has given out the following opinion :

DISCUSSION

The right of the Principal Allied and Associated Powers to fix Poland's eastern frontiers is based upon paragraph 3 of Article 87 of the Versailles Treaty, thus worded : "The frontiers of Poland, not laid down in the present Treaty, will be subsequently determined by the Principal Allied and Associated Powers." The Lithuanian Government has therefore justly declared in its exposition "that this article, binding for all the Powers signatory to the said Treaty, of which Poland is one, cannot have that character for the States that have not signed it, of which Lithuania is one ; that, consequently, the said Article 87 cannot confer upon the Allied and Associated Powers the right to determine the Polish-Lithuanian frontiers."

The Conference of Ambassadors also took care to base its competence to adopt the decision of March 15, 1923, upon the Lithuanian Government's note of November 18, 1922—" whereas on its side (says the decision in question) the Lithuanian

Government has already, in its note of November 18, 1922, shown itself anxious to see the said Powers make use of the said rights."

If it is thus established that the general mission to determine Poland's frontiers, conferred upon the Principal Allied and Associated Powers by the Versailles Treaty, could not be exercised, as regards the Lithuano-Polish frontiers, except with the consent of Lithuania, it follows logically that the Conference of Ambassadors could not go beyond the limits set for it by the Lithuanian demand, without committing an *excess of power.* Any act accomplished by the Conference beyond those limits cannot claim recognition on the part of the Lithuanian Government.

The undersigned is therefore of opinion that, in order to reply to the question submitted by the Lithuanian Government, it is necessary to proceed with a juridical analysis of both the Lithuanian note of November 18, 1922, and the decision of the Conference of Ambassadors of March 15, 1923.

But before entering upon this analysis, the undersigned has to state that from the report of the sitting of the Council of the League of Nations held at Geneva on Saturday, April 21, 1923, at 3.30 p.m.,[1] it follows that *the said Council did not express any opinion on the subject of the decision of the Conference of Ambassadors.* A report was actually submitted to the Council by M. Hymans on a question drafted thus: " Execution of the Council's recommendation of February 3, 1923, concerning the establishment of a line of demarcation in the neutral zone." In this report, after having dwelt upon the circumstances in which the said establishment took place, M. Hymans gave an account of the procedure undertaken before the Conference of Ambassadors. *Inter alia* he said: " On March 15, 1923, the Conference of Ambassadors gave its decision, according to which the frontier is in conformity with the line of demarcation traced in virtue of the Council's last recommendation." And some lines farther on: " As a political frontier has thus been determined in accordance with the procedure laid down in the Treaty of Versailles, which was accepted by the Lithuanian Government, the question dealt with by the Council at its last session has now become part of the history of the dispute which has occupied the attention of the Council for so long, and which,

[1] *Official Journal of the League of Nations,* June 1923, 4th year, No. 6, *Procès-verbaux of the 24th Session of the Council.*

thanks to its efforts for two years, has been prevented from degenerating into a sanguinary conflict."[1]

The report of the sitting of the Council of April 21, 1923, records an exchange of observations between M. Hymans and the Lithuanian delegate, M. Galvanauskas, on the character of the appeal addressed by Lithuania to the Conference of Ambassadors. Those observations will be examined later. Here the undersigned has only to point out the following declaration concerning the character of M. Hymans's report on the circumstances supervening since the Council's resolution of February 3, 1923.

M. Hymans pointed out that the report which he had submitted to the Council contained no conclusions dealing with the different circumstances which had arisen since the last resolution of the Council. It was simply a progress report. There was another question on the agenda: this was of a legal nature, and concerned the protest of the Lithuanian Government against the Council's last resolution.

Regarding the first question submitted to the Council for its examination, M. Galvanauskas had disputed certain of his statements. He reiterated, however, that the Council was not called upon to express an opinion. The decision of the Conference of Ambassadors had not been submitted to it, and it could not therefore discuss it. The one point that he had made clear was that Lithuania had accepted the competence of the Conference of Ambassadors, as was irrefutably proved. The only reservation that she had made was of no value, since the Convention of Suvalki contained no stipulation whatever concerning territorial questions, but was only a military agreement of a purely provisional nature.

M. Galvanauskas having then formulated an observation with reference to the phrase of the report declaring that the question dealt with by the Council belonged henceforth to history, M. Hymans in reply desired to point out that his point of view was in conformity with the previous decisions of the Council. In its last resolution, the Council formally stated that that resolution was final. In reality the only question before the Council was that which it would deal with next and which concerned the Lithuanian Government's request that the question of the legal interpretation of the Council's final resolution should be submitted to the Permanent Court of International Justice.

[1] *Official Journal*, Annex 499, pp. 664–5.

As regarded the substance of the question, namely, the political question—that was no longer before the Council.

Lastly, the President of the Council expressed himself in these words: "The President observed that, as the Rapporteur had pointed out, the Council only had before it a progress report of the events that had recently occurred. It took note of the progress report without expressing any opinion, since there was no resolution before it."

It thus follows from what has gone before and in particular from the declaration of the President of the Council of the League of Nations, that M. Hymans's report is a simple review of events, and that the Council did not express any opinion on the decision of the Conference of Ambassadors of March 15, 1923.

FIRST QUESTION

Is the Government of the Lithuanian Republic bound, in law, by the decision of the Conference of Ambassadors of March 15, 1923, concerning the Polish-Lithuanian frontiers?

I

What is the nature of the decision which the Lithuanian Government wished to obtain from the Conference of Ambassadors by its note of November 18, 1922? Did Lithuania wish to evoke a *political decision* from the Conference, or rather an arbitral award based upon the *law*? Or better still, did she wish to introduce before the Council a new *procedure of conciliation* with Poland?

First Hypothesis

1. We must at the very outset categorically exclude the hypothesis that Lithuania would have solicited from the Conference a *political decision* similar to those whereby the victorious Powers in various treaties have with sovereign power determined the frontiers of States vanquished or newly created by them, a decision to which she would have submitted in advance and unconditionally.

The entire history of the various phases of the Lithuano-Polish conflict which have been unfolded before the League of

Nations attest Lithuania's firm determination not to depart from her rights to Vilna. It must above all be noted that the project of solution of the conflict drafted by M. Hymans, recommended by the Council, and approved by the Assembly of the League of Nations on September 24, 1921, attributed Vilna to *Lithuania*: the disagreement between the two parties, which made them reject the project, did not arise over this attribution, but over the character of the political union which was at the same time to be established between Lithuania and Poland. Then when the Council, after having terminated the conciliation procedure, through its resolution of January 13, 1922, proposed to the parties to substitute for the neutral zones established between their armies a *provisional demarcation line*, the Lithuanian Government clearly refused to give its consent to a division of the zones which would run the risk of being interpreted as an implicit recognition on its part of the state of things created by General Zeligowski's *coup de force*.

The Lithuanian Government's point of view has been revealed on several occasions and in the most categorical fashion. Among this class of ideas there should be quoted in the first place the declaration which the Lithuanian delegate, M. Naruševičius, made at the same sitting of January 13, 1922, of the Council of the League of Nations.[1]

" In view of the Council's resolution terminating the procedure of conciliation which it had instituted between the two parties," the Lithuanian delegate states that " the Lithuanian Government declares itself prepared to seek other methods of reaching a peaceful solution of the dispute." The Lithuanian delegation expresses the opinion " that the true origin of the dispute lies in the absence of a definite frontier between Lithuania and Poland. It may truly be said that if the Treaty of Versailles, which gave a legal statute to Poland, had also definitely established the frontiers of that country, the present serious dispute between Lithuania and Poland would never have arisen to trouble the peace of Eastern Europe. The Lithuanian Government has therefore the honour respectfully to request the Council of the League of Nations to draw the attention of the Supreme Council of the Allied and Associated Powers to the seriousness of the situation, and to request the latter to fix the eastern frontiers of Poland in accordance with paragraph 3 of Article 87 of the

[1] *Official Journal of the League of Nations*, February 1922, *Procès-verbal of the 16th Session of the Council*, Annex 195 (d), pp. 138–9.

Treaty of Versailles. This step would at the same time settle the Polono-Lithuanian dispute. The Lithuanian Government desires to state that it would be equally willing to entrust the solution of the Vilna dispute either to the Permanent Court of International Justice or to a Court of Arbitration."

Thus, by this declaration, Lithuania indicates that after the Council's desistance, she recognized the possibility of three other pacific solutions of her conflict with Poland, solutions which would eventually be secured through arbitration, a judgment of the Permanent Court of International Justice, or a decision of the Conference of Ambassadors. But M. Naruševičius's declaration does not contain any indication of the *conditions* on which Lithuania would accept one of these three envisaged procedures. Neither did M. Naruševičius pledge his Government regarding the *compromise* to be concluded with Poland in case of arbitration or recourse to the Permanent Court, nor did he do so in connexion with the conditions on which the Lithuanian Government would submit to a decision of the Conference of Ambassadors. His declaration conveys only a *declaration of principle* from his Government, to accept one of the three enumerated pacific procedures.

More particularly, we cannot see in M. Naruševičius's declaration an unconditional submission of Lithuania to any decision of the Conference of Ambassadors, since in its last paragraph but one the same declaration explains the Lithuanian Government's refusal to consent to a division of the neutral zone by the fear lest such consent should be interpreted as a renunciation of its rights to Vilna. "On the other hand," said M. Naruševičius, "the assent of the Lithuanian Government to the establishment of a new line of demarcation between the Lithuanian forces and those of Zeligowski would be fatal to Lithuania, first, because such action might be interpreted as a recognition or toleration of the state of affairs created by the rebel general, and secondly, because the replacement of the provisional regime cancelling all the provisions of the former would, in spite of all assurances to the contrary, render the regime contemplated by the Suvalki Agreement null and void, both from the point of view of logic and of actual fact. Such are the reasons which, much to our regret, prevent us from giving free assent to the changes proposed in the existing state of affairs."

M. Naruševičius's declaration of January 13, 1922, should be compared with the note addressed some months later, April 8,

1922, by M. Jurgutis, Minister for Foreign Affairs of Lithuania, to M. Hymans, President of the Council of the League of Nations (*Lithuanian Yellow Book*, No. 131). "The Lithuanian Government," says M. Jurgutis, "remains persuaded that only the complete fulfilment, by the Polish Government, of the Suvalki Convention would offer a solid basis for the settlement of the Polono-Lithuanian dispute, and for the subsequent establishment of relations of good neighbourhood and of amity with Poland. The Lithuanian Government has never renounced the stipulations of the Suvalki Agreement." And further: "Your Excellency will permit me to observe that, in the present circumstances, any division whatsoever of those zones could be effected only to the manifest prejudice of the vital interests of Lithuania. In spite of the provisional character lent to this new line, in spite of all the reservations of the Council on the territorial rights of the two States, the Lithuanian Government, in accepting such a delimitation, would accomplish an act that would bear the undeniable character of renunciation of the Suvalki Agreement and of a legitimation of the state of things created by General Zeligowski's *coup de force* and by the vote of the Polish Diet of March 24 last, providing for the annexation of the Vilna region to Poland."

It clearly follows from this note of the Lithuanian Minister for Foreign Affairs that by M. Naruševičius's declaration the Lithuanian Government had in no way in advance and unconditionally accepted the decision of the Conference of Ambassadors, since "the Lithuanian Government has never renounced the stipulations of the Suvalki Convention."

2. Some weeks after the despatch of M. Jurgutis's note of April 8, 1922, on May 17 of the same year the Council of the League of Nations discussed a draft resolution of M. Hymans, recommending the establishment of a provisional demarcation line in the Vilna neutral zone.[1] The Lithuanian delegate, M. Sidzikauskas, combated this draft, and *inter alia* declared: "If the Lithuanian Government now gave its consent to the tracing of a new administrative line of demarcation other than that provided for in the Suvalki Convention, it would be tantamount to endorsing the state of affairs created by the action of the rebel General, and by the decision of the Polish Diet dated March 24, which caused the disputed territory to be annexed to

[1] *Official Journal of the League of Nations*, June 1922, *Procès-verbal of the 18th Session of the Council*, pp. 549–52.

Poland. The situation would then be changed, and the rights and interests of the Lithuanian State would obviously be injured." And some lines farther on M. Sidzikauskas declares: "The Lithuanian delegation therefore felt obliged, to its great regret, to refuse to accept the resolution before the Council or to recommend that it should be accepted by the Lithuanian Government. It would like, however, to make two suggestions which, *if preceded or followed by the execution by Poland of the Suvalki Convention*,[1] would put an end to the sufferings of the Lithuanian population in the neutral zone."

"(1) The Lithuanian Government asks the Council of the League of Nations to take the population of the neutral zone under its protection until the execution by Poland of the Suvalki Convention, or until a definite solution of the Polish-Lithuanian dispute has been reached, and to appoint to that end a High Commissioner of the League of Nations belonging to a neutral State to supervise on the spot the application of such dispositions as the Council may wish to make.

"(2) The Lithuanian Government asks the Council to draw the attention of the Allied Powers to the urgent and absolute necessity of tracing the eastern frontiers of Poland, since the right to do this has been given to these Powers by Article 87 of the Treaty of Versailles."

It follows from this text that the request of the Lithuanian Government addressed, through the intermediary of the Council of the League of Nations, to the Conference of Ambassadors, on the subject of the determination of Poland's eastern frontiers, is only a *suggestion subordinated to the preliminary or subsequent fulfilment by Poland of the Suvalki Convention.*

M. Sidzikauskas's declaration, as little as that of M. Naruševičius, can thus be interpreted in the sense of an unconditional submission of Lithuania to any decision of the Conference of Ambassadors on the subject of the Lithuano-Polish frontiers.

The Council of the League of Nations ignored all the Lithuanian protests against the modification of the situation in the neutral zone, and adopted on February 3, 1923, a resolution leaving to the two interested Governments respectively the right to establish their administration in the portions of the neutral zone defined in this resolution. The Lithuanian delegate raised the most energetic protest, declaring that, in his opinion, the

[1] The italics are mine.—A. M.

Council's recommendation would be applicable only if it were accepted by both parties.[1]

3. The Lithuanian Government maintained its rights to Vilna with the same firmness in its note of November 18, 1922, addressed to the Principal Allied and Associated Powers, on the subject of the internationalization of the Niemen.[2] Indeed the Lithuanian Government declares itself " persuaded that the present state of relations between Lithuania and Poland cannot be regarded by the Conference of Ambassadors as a state of peace permitting the application of collective conventions to the regime of international rivers." The Lithuanian Government affirms that " these abnormal relations are the consequence of Poland's breach of her undertakings towards the League of Nations as well as towards Lithuania." And it concludes: " Consequently, the Lithuanian Government can but declare afresh that the regime of navigation on the Niemen, instituted by the Treaty of Versailles, a regime which it accepts without the slightest reservation, will receive its application as soon as Poland who, notwithstanding her solemn undertakings towards Lithuania, at present holds Lithuanian territories, shall have honoured her undertakings towards Lithuania, and shall thus have permitted the Lithuanian Government to contract with her relations of peace and amity."

As we see, these lines once more affirm the Lithuanian Government's unshaken decision to maintain its rights to Vilna. And it is immediately afterwards that the passage occurs upon which the Conference of Ambassadors, *which paid no attention to Lithuania's preceding suggestions addressed to the Council of the League of Nations*, bases its entire competence to determine Lithuania's frontiers!

" To this declaration the Lithuanian Government ventures to add that it would be particularly grateful to the Allied and Associated Powers if, with a view to hastening the advent of the era of peace and amity between Lithuania and Poland, those Powers would be good enough to use the rights which Article 87 of the Treaty of Versailles confers upon them and determine Poland's eastern frontiers, in taking account of the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania."

The simple juxtaposition of this appeal to the preceding

[1] *Official Journal of the League of Nations*, March 1923, pp. 237–9.

[2] *Lithuanian Yellow Book, Question of Vilna*, p. 382, Annex 3 to No. 152.

passages of the note of November 18, 1922, excludes all possibility of regarding it as an unconditional submission of Lithuania to the will of the Conference of Ambassadors on the subject of the Vilna territory. That Government besides had no special reason to accept in advance a decision of a group of four Powers, when formerly it had never consented to subscribe beforehand to a decision of the Council of the League of Nations regulating the fate of Vilna. The Lithuanian Government's note of protest of April 16, 1923, justly invokes this argument. And it adds with no less reason: "But the Lithuanian Government would never be able to defer entirely to the decision of the Conference of Ambassadors, a purely political assemblage of which one member at least represented a Power allied to its adversary." [1]

Lastly, to all these arguments militating against an anticipated acceptance by Lithuania of a political decision of the Conference of Ambassadors should be added that of the formal reservations with which the note of November 18, 1922, has encompassed the appeal to the Powers. The sole existence of those reservations rules out any unconditional submission on the part of Lithuania to the Conference. And the fact that the latter did not deem itself bound to mention them in the decision of March 15, 1923, cannot surely render them non-existent.

4. During the sitting of the Council of the League of Nations of April 21, 1923,[2] M. Hymans insisted at length on Lithuania's recognition of the competence of the Conference of Ambassadors. "Both the parties," said the eminent member of the Council, "have consented to recognize the competence of the Conference of Ambassadors. There is no agreement regarding the decision of the Conference of Ambassadors, since Lithuania has protested, but Lithuania has formally consented to recognize the competence of the Conference of Ambassadors in respect of the tracing of the frontiers. Not only has she recognized the competence of this body, but she has asked the Conference of Ambassadors, by public acts at this table and elsewhere, to trace that frontier. I shall prove this by irrefutable facts. I must add that I am not here to discuss the Conference of Ambassadors' decision, which is not before the Council; but I insist on the fact that Lithuania has approached the Allied Powers urging them to trace the frontier in order to put an end to the existing dispute. She has

[1] *Lithuanian Yellow Book*, p. 378.
[2] *Official Journal of the League of Nations*, June 1923, pp. 582–4.

therefore explicitly recognized the competence of the Conference of Ambassadors and has thereby given her consent."

M. Hymans then quoted M. Naruševičius's declaration according to the summary of the Council's sitting of January 13, 1922, to which he added the following comments: "Thus, in the name of his Government, M. Naruševičius asked the Council of the League of Nations to approach the Allied Powers in order that they should be induced to fix the frontiers in accordance with the Treaty of Versailles."

M. Hymans continues as follows: "This is recorded in the minutes of the meeting of January 13, 1922, which are necessarily somewhat abridged, but in the exact words of M. Naruševičius, which are to be found in Annex 295 (d) of the same number of the *Official Journal*, I find this characteristic phrase: 'The Lithuanian Government has therefore the honour respectfully to request the Council of the League of Nations to draw the attention of the Supreme Council of the Allied and Associated Powers to the seriousness of the situation, and to request the latter to fix the eastern frontiers of Poland, in accordance with paragraph 3 of Article 87 of the Treaty of Versailles. This step [and I want you especially to notice the importance of this sentence] would at the same time settle the Polono-Lithuanian dispute.'"

After having also reproduced M. Sidzikauskas's declaration, M. Hymans proceeds: "The same request is to be found in a note dated November 18, 1922, to which M. Galvanauskas referred in a very recent letter dated April 16, 1923, addressed to M. Poincaré, President of the Conference of Ambassadors, and in which the Lithuanian representative protested against the decision of the Conference regarding the frontiers.

"One point is clearly established. Lithuania has not ceased to make a request to both the Council and the Allied Powers direct that the frontier should be fixed, stating that this would bring about a final solution of the dispute. By making these requests she has recognized Article 87 of the Treaty of Versailles, and has therefore abandoned the argument, which she has several times made use of before the Council, namely, that she was not bound by the Treaty of Versailles, because she had not been represented at the Peace Conference, and because she had not signed the Treaty. That is perfectly true, but by the acts and statements which I have just quoted she has adhered to Article 87 of the Treaty, she has asked for it to be applied,

and she has recognized the competence of the Conference of Ambassadors."

With regard to these declarations of His Excellency M. Hymans, the undersigned expresses the following opinion:

It is perfectly correct that by her appeal to the Conference of Ambassadors Lithuania removed the absolute incompetence of the Allied and Associated Powers to lay down the Polono-Lithuanian frontiers, an incompetence resulting from the absence of her signature from the Versailles Treaty; but the undersigned considers that he has shown above that from neither the declaration of M. Naruševičius nor that of M. Sidzikauskas can we deduce an *unconditional* submission on the part of Lithuania to any decision of the Conference. Yes, M. Naruševičius asked the Conference for a determination of Poland's eastern frontiers, but what determination? A "determination which at the same time would settle the Polono-Lithuanian dispute." M. Hymans himself insists upon this end of the phrase, but seems to see here an unconditional submission to the wishes of the Conference. The undersigned, in the light of the facts previously adduced, interprets that passage in a totally difference sense: Lithuania demanded an *equitable* determination, a determination in harmony with the reservations occurring in the same declaration with regard to the neutral zone, and with M. Jurgutis's subsequent note. As for M. Sidzikauskas's declaration, M. Hymans has not explained himself regarding the passage which declares that the *suggestions* formulated by Lithuania should be followed or preceded by the fulfilment on the part of Poland of the Suvalki Convention.

Moreover, as we have already remarked, the Conference in its decision took no notice whatever of those two *indirect* appeals of Lithuania to its authority. And as regards the sole direct appeal, that of the note of November 18, 1922, M. Hymans recognized the existence of *reservations*. "Nevertheless (says he) Lithuania made the following reserve: 'In taking account of the solemn undertakings of Poland towards the Lithuanian State, as well as the vital interests and rights of Lithuania.'"

M. Hymans, however, considers this reservation inoperative. After having analyzed the Suvalki Convention, he concludes thus: "Finally, I repeat, in order to make my point quite clear, that the decision taken by the Conference of Ambassadors has put an end to that dispute, since this decision was given in virtue of an authority and a jurisdiction the competence of which has

been recognized by Lithuania. The reservation put forward by Lithuania is without foundation, as I have just shown you by the explanations which I have had the honour to give you concerning the nature of the Suvalki Convention."

The undersigned will later return to M. Hymans's argumentation concerning the *value* of the reservations formulated by the Lithuanian Government. It will suffice here to state that the *existence itself* of a reservation is admitted by M. Hymans, and from that moment, from his own point of view, *we cannot pretend that Lithuania had unconditionally submitted to the decision of the Conference.* Whether or not that reservation is without import is a distinct question affecting the substance of the question.

SECOND HYPOTHESIS

It is equally impossible to suppose that, by its note of November 18, 1922, the Lithuanian Government asked the Conference of Ambassadors to render an *arbitral award* on its frontier conflict with Poland.

In the very first place, no *international obligation* forced Poland to accept in 1922 arbitration with Lithuania. Through the conciliation procedure followed before the Council of the League of Nations, the two States had actually satisfied the provisions of Article 12 of the Covenant, which imposed upon them only the choice of one of the following pacific means: Arbitration procedure, judicial settlement, or inquiry by the Council.[1] After the closure of the conciliation procedure before the Council, Lithuania moreover proposed to Poland to submit the Vilna question to the decision of the Permanent Court of International Justice.[2] Poland, however, who had not signed

[1] Paragraph 1 of Article 12 of the Covenant: "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration, or to judicial settlement, or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators, or the judicial decision, or the report of the Council."

[2] A note from M. Jurgutis, Minister for Foreign Affairs of Lithuania, dated February 20, 1922, and addressed to M. Skirmunt, Minister for Foreign Affairs of Poland, proposes to Poland to submit to the decision of the Permanent Court of International Justice the solution of the following questions:

"1st: The reality in fact of the rupture by Poland of the Lithuano-Polish undertaking concluded on October 7, 1920, at Suvalki; and, should the Court give an affirmative reply to this first question,

2nd: The nature and extent of the reparation due by Poland for the rupture of this international undertaking" (*Lithuanian Yellow Book on the Vilna Question*, pp. 308–11).

the optional declaration provided in paragraph 2 of Article 36 of the Statute of the Permanent Court, availed herself of her right to reject this proposal.[1] On the other hand, Lithuania and Poland are not bound between themselves by any special arbitration convention. Arbitration between the two States can therefore be based only upon their harmonious will.

Now, no *compromise* setting forth this will and defining the object of the dispute has been established by the parties, in conformity with the unwritten arbitration law. And even if one wished to set aside this circumstance, the character of the two reservations inserted in the Lithuanian note of November 18, 1922, excludes any supposition that it could have entered into the Lithuanian Government's mind to elicit from the Conference of Ambassadors, on the question of the Lithuano-Polish frontiers, an arbitral award, i.e. binding upon both parties.

Actually in her note previously mentioned, Lithuania asks the Powers " to determine Poland's eastern frontiers, in taking account of the solemn undertakings of that State towards the Lithuanian State, as well as the vital interests and rights of Lithuania."

It is necessary immediately to mention the terms of this appeal, unprecedented in arbitral procedure. Instead of indicating to the Conference the rules of law which it would have to apply, or expressly authorizing it to decree in equity, the passage quoted from the Lithuanian note of November 18, 1922, binds the Conference of Ambassadors by certain reservations. And those reservations are not of a character permitting the conclusion that Lithuania desired to invest the Conference with arbitral functions :

(*a*) *The first reservation* binds the Conference to take into account " the solemn undertakings " of the Polish State towards the Lithuanian State. It has already been stated that the Lithuanian appeal occurs in the note of November 18, 1922, immediately after the affirmation of Lithuania's rights to " the Lithuanian territories " which Poland, " notwithstanding her solemn undertakings towards Lithuania, at present holds." The Lithuanian Government does not simply invite the Conference to apply the provisions of the existing conventions between Lithuania and Poland ; Lithuania *declares* the existence of Poland's solemn undertakings towards her, and requests the

[1] See M. Skirmunt's note to M. Jurgutis of March 15, 1922, *Lithuanian Yellow Book on the Vilna Question*, pp. 312–14.

Conference *to take account thereof.* She thus implicitly reserves to herself the right not to submit to a decision of the Conference which, in her opinion, does not take into account the aforesaid undertakings.

(*b*) *The second reservation* contained in the Lithuanian appeal, binding the Conference to take into account " the vital interests of Lithuania," bears an essentially *subjective* character. The rôle which the formula " of independence, honour or vital interests " has played in the history of international arbitration is well known. This famous clause has served specifically to remove from compulsory arbitration disputes affecting the political interests of States ; its application really depends upon the subjective estimation of the contracting States. There exist, it is true, treaties that submit *all* conflicts between two States to arbitration and do not contain the clause relative to vital interests. The Lithuanian note, however, offers precisely the opposite phenomenon, since the Lithuanian Government expressly begs the Conference to take into account its vital interests. It thus declares that the dispute affects the said interests ; and since it has not otherwise defined them, it remains absolutely free to estimate whether or not they have been taken into account; because without this freedom of estimation the reservation in question would have no value whatever for Lithuania. Thus, by this reservation Lithuania assured herself the right to refuse her adhesion to any decision of the Conference of Ambassadors which she might deem incompatible with her *vital interests*.

(*c*) Lastly, the *general* character of the third reservation, binding the Conference *to take account of the rights* of Lithuania, does not exclude a *juridical* appreciation, by that Power, of the award to be rendered.

The undersigned concludes that the three reservations contained in the Lithuanian note of November 18, 1922, do not warrant the supposition that Lithuania wished to elicit a compulsory arbitral award.

Third Hypothesis

The reservations incompatible with recourse to arbitration are, on the contrary, explicable if we interpret the note of November 18, 1922, as an appeal to the *mediation* of the Powers.

Actually the advice given by a mediator does not possess, in positive international law, any binding force upon the parties.

Thus mediation, according to the Conventions of Peace of 1899 and 1907, bears the character solely of advice. The Bryan Treaties, concluded in 1913 and 1914, equally reserve to the parties entire freedom as regards the effect to be given to the reports of international Commissions. In the same manner, *conciliation treaties* concluded after the Great War agree in guaranteeing to the parties entire freedom of action in regard to the report established by the Commission of Conciliation—a report which never possesses the binding character of a judicial or arbitral decision. Only in certain treaties, the parties undertake, within a reasonable interval, to inform each other whether they accept the conclusions of the report. Lastly, the Covenant of the League of Nations does not attach to the reports of the Council of the League—even if they are unanimously accepted—the effects which it attributes to arbitral or judicial awards.[1]

If now we ascribe to the note of November 18, 1922, the character of an *appeal in conciliation*, the Lithuanian reservations become natural. It is to the *mediatory* Powers, and to them alone, that Lithuania could entrust the duty of taking into account Poland's engagements, as she understood them, together with her own vital interests and rights, the non-obligatory character of the mediation permitting her not to bow to a decision that did not give her satisfaction in these respects.

It is true that the Lithuanian Government had not entered

[1] Paragraph 6 of Article 15 of the Covenant of the League of Nations reads: " If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." On the contrary, paragraph 4 of Article 13, of the Covenant, which deals with arbitral or judicial solutions, provides: " The members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such an award or decision the Council shall propose what steps should be taken to give effect thereto." The difference between these two texts is obvious. Whereas, by virtue of Article 13, the members of the League agree to carry out arbitral or judicial awards, Article 15 does not contain any pledge to carry out the unanimous report of the Council, and registers merely the engagement of the *members* of the League not to have recourse to war against any *party* which complies with the conclusions of the Council's report. The terms employed indicate also that the *recalcitrant party* is not bound by this engagement which concerns only the other members of the League. Moreover, by virtue of Article 13, the Council, in the event of any failure to carry out an award, is required to propose the steps to be taken to give effect thereto, whereas Article 15 contains no collective sanction.

" The limited binding effect " of the recommendation of the Council of the

into a previous agreement with the Polish Government on the subject of its demand; but the reason for this derogation from international usage is explained by the special nature of the case. The Polish Government was already bound by the Versailles Treaty to accept the eastern frontiers which the Conference might assign to it. On the contrary, the Lithuanian Government, free from any engagement, could give its assent to the intervention of the Powers on conditions fixed by itself. That is why, without a previous agreement with Poland, the Lithuanian Government could address its appeal to the Powers, already pledged by mandate to determine Poland's eastern frontiers. At the sitting of the Council of the League of Nations of April 21, 1923, the Lithuanian Prime Minister, M. Galvanauskas, expressed himself on this subject in the following terms: " Consequently, Lithuania had only approached the Conference of Ambassadors in order to find a method, in concert with the Conference, of tracing the Polono-Lithuanian frontier." [1] This declaration seems to the undersigned exactly to define the situation. Moreover, it does not in any way exclude Poland's participation in the conciliation procedure contemplated by the Lithuanian note of November 18, 1922.

It seems, therefore, evident to the undersigned that in applying to the Powers, *Lithuania made an appeal to mediators*, to " friendly compounders " (*aimables compositeurs*), and not to arbitrators.

League of Nations has been laid down by the high authority of the Permanent Court of International Justice. The advisory opinion of the Court rendered on November 21, 1925, on the question of the interpretation of Article 3, paragraph 2, of the Lausanne Treaty, contains the following passage: " Though it is true that the powers of the Council in regard to the settlement of disputes are dealt with in Article 15 of the Covenant, and that under that article the Council can only make recommendations which, even when made unanimously, do not of necessity settle the dispute, that article only sets out the *minimum* obligations imposed upon States, and the minimum corresponding powers of the Council. There is nothing to prevent the parties from accepting obligations and conferring on the Council powers wider than those resulting from the strict terms of Article 15 and, in particular, from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation the power to give a decision which, by virtue of their previous consent, compulsorily settles the dispute " (*Advisory Opinion*, No. 12, p. 27).

Further, on p. 31, the Court speaks incidentally of " the limited binding effect of the recommendation " of the Council, contemplated by paragraphs 6 and 7 of Article 15 of the Covenant.

Thus the Court's opinion recognizes only the right of the *parties* to confer upon the Council power to adopt a decision compulsorily deciding the dispute. Article 15 of the Covenant does not confer this power upon the Council.

[1] *Official Journal of the League of Nations*, June 1923, p. 584.

II

It is now necessary to examine the form in which the decision of the Conference of March 15, 1923, was rendered, in order to establish whether or not the latter corresponds to the Lithuanian demand of November 18, 1922.

1. AGREEMENT between the Conference and the Lithuanian Government upon one point, negative, it is true, must be affirmed at the outset. If, as we have shown above, Lithuania did not intend to resort to the arbitration of the Conference of Ambassadors, the latter, on its part, did not regard itself as invested with the functions of an arbitrator, seeing that, with regard to procedure, the Conference did not take into account the most established rules of unwritten arbitration law. There was no exchange of exhibits, there were no oral pleadings. As the Lithuanian Government characterizes it in its note of protest of April 16, 1923, "the decision depriving her of her capital was adopted by the Conference of Ambassadors in her absence, and without even having summoned her to furnish the slightest explanations of this question affecting Lithuania's most vital interests." An award by default, rendered *after* summons, would have been null.[1] So much the more null would be an arbitral award terminating a procedure for which the parties had not even received a summons. Under these conditions *it is impossible to suppose that the Conference of Ambassadors intended to render, on March* 15, 1923, *an arbitral award.*

2. On the other hand, the Conference did not interpret the demand of November 18, 1922, in the sense of recourse to its *mediation*—a sense which Lithuania ascribed to it, inasmuch as the Conference adopted its decision without having invited the parties to expound their case to it, as is the practice before international commissions of conciliation,[2] and as was the case

[1] In his work, *International Justice*, M. Politis very rightly says (p. 86): "Without a formal clause of compromise, one cannot conceive procedure by default. That is the consequence of the optional character of arbitration. Necessary in order to begin the suit, agreement of the parties must continue until the end of the case; otherwise judgment is not possible. If the award were rendered without one of the parties having offered its defence, it would be null and void. Undoubtedly the Government which, after having consented to arbitration, should refuse to yield to the established procedure, would violate its engagement, but this rupture of the compromise would itself deprive the arbitrator of the power to rule."

[2] See, for example, the settlement recommended by the Assembly of the League of Nations in its Resolution of September 22, 1922, Article 5: "The procedure before the Conciliation Commission is contradictory."

in the same affair before the Council of the League of Nations. The decision transferring sovereignty over the contested territory to Poland has been " accepted " by that State, in proof whereof appeared a declaration of her representative, Count Maurice Zamoyski, in the text of the document, beneath the signatures of the four members of the Conference. But the signature of *Lithuania* is missing at the foot of the document. The decision was only notified to the last-named Power, and instantly provoked on her part the most energetic protests, which remained without any response. Now, in thus giving a binding force to a decision accepted by one only of the parties which had solicited its intervention, the Conference of Ambassadors clearly indicated that it had not intended to exercise a mediatory action, the conception of mediation in unwritten international law excluding a binding character from the solution proposed by the mediator.

3. The undersigned considers therefore that he has proved that the decision of the Conference of Ambassadors of March 15, 1923, does not bear the character either of an arbitral award or of a proposal from a conciliator. It follows logically that this act is invested with the character of a decision adopted by a body ruling supremely and inspired solely by diplomatic considerations. In other words, *the Conference of Ambassadors on March* 15, 1923, *adopted a decision of a political category.*

Now, as we have proved above, Lithuania did not request the Conference of Ambassadors to render such a sovereign decision. On the contrary, she encompassed her demand with express reservations. The fact that the Conference did not think that it ought to mention these reservations in its decision is surely not sufficient to deprive them of their value.

From the standpoint of formal law, Lithuania thus retains her full liberty of appreciation and of action in regard to an award to which she has never subscribed in advance. She is not bound to accept it.

SECOND QUESTION

Is the Government of the Lithuanian Republic bound in equity by the decision of the Conference of Ambassadors of March 15, 1923, regarding the Polish-Lithuanian frontiers ?

The *second* question submitted is to ascertain whether Lithuania, while not bound by the rules of international procedure

to carry out the decision of the Conference of Ambassadors, destitute, so far as she is concerned, of all binding force, is not bound in *equity*? In other words, it will be necessary to determine the question whether, *in the main*, the decision of the Conference of Ambassadors has or has not taken into account the reservations formulated by Lithuania, since if such were the case, one might perhaps maintain that Lithuania is bound in equity, otherwise in law, to submit to the decision of the " friendly compounders " to whom she applied.

The reply to this question will not be the same for all the Lithuanian reservations. As we have already mentioned above, one of them, that of Lithuania's " vital interests," bears an essentially *subjective* character. For that reason the undersigned eliminates this reservation from the inquiry, since it can be specified only by the Lithuanian Government itself. On the other hand, he considers that he is able to prove that under two other heads the decision of the Conference of Ambassadors contains elements, justifying the assertion, in an *objective* manner, that it infringed the conditions with which Lithuania invested her appeal.

1. The note of November 18, 1922, invited the Conference to take into account the " solemn undertakings " of the Polish State towards the Lithuanian State.

By these solemn undertakings, as follows from a passage of the same note which precedes the Lithuanian appeal and which has been cited above, the Lithuanian Government had in mind, without any doubt whatever, the Lithuano-Polish Agreement of Suvalki, of October 7, 1920.[1] The first chapter of this Agreement laid down " a demarcation line which shall not decide in advance in any respect whatever the territorial rights of the two contracting parties," a line which left the Vilna territory in Lithuania's possession. Chapter V of the same Agreement reads: " The present agreement comes into force at noon on October 10, 1920, this date, however, not affecting the cessation of hostilities already accepted, and remains in force until all disputed questions between the Poles and Lithuanians shall have been definitely settled."

In view of these categorical terms employed in Chapter V, the Suvalki Agreement was to remain in force until its replacement by a *definite* convention between Poland and Lithuania. It should be noted that after the rupture of this agreement by General Zeligowski and hostilities between the Lithuanian and

[1] *Lithuanian Yellow Book, Question of Vilna*, No. 32.

Polish troops which followed, a *protocol* was signed on November 29, 1920, at Kovno, between the Lithuanian and Polish delegates, putting an end to hostilities and establishing a neutral zone between the two armies.[1] This protocol, however, signed at the suggestion of the Military Control Commission of the League of Nations, was accompanied by a declaration from the Lithuanian delegate, M. Jonynas, safeguarding the rights of Lithuania. This declaration reads as follows : " While giving its signature to the act whereby hostilities between the Lithuanian army and the troops commanded by General Zeligowski come to an end, it does not for one moment admit that the troops of General Zeligowski may remain in the territory occupied by them. It has signed this act with the object of facilitating the evacuation by the said troops of the territory occupied by them. The Lithuanian Government therefore has the honour to beg the Commission of Control to be good enough to take note of this declaration, and to approach the Council of the League of Nations in order to obtain the evacuation by General Zeligowski's troops of the territory occupied by them at the earliest possible date." [2]

The Kovno protocol does not therefore bear a *definite* character. The Lithuanian Government rightly insisted upon this circumstance in its note of April 8, 1922, addressed to the President of the Council of the League of Nations [3] :

" The Lithuanian Government has never renounced the provisions of the Suvalki Agreement. It is true that at the suggestion of the Military Control Commission of the League of Nations, it consented to sign, on November 29, 1920, a protocol stipulating the cessation of hostilities with the Polish troops commanded by General Zeligowski, and contemplating the subsequent creation by the Control Commission of a neutral zone in the region of Vilna. But the protocol cannot in any way be regarded as a modification of the Suvalki undertaking. In signing it the Lithuanian Government merely wished to facilitate the evacuation by General Zeligowski's troops of the invaded territory, which was in entire harmony with the decision of the Council of the League of Nations of October 27, 1920. On the occasion of the signature of this protocol, the Lithuanian Government moreover made a corresponding reservation, and

[1] *Lithuanian Yellow Book, Question of Vilna*, Annex 1 to No. 69.
[2] *Ibid.*, Annex 2 to No. 69.
[3] *Lithuanian Yellow Book*, No. 131.

begged the Control Commission to take note of the same and bring it to the knowledge of the Council of the League of Nations."

The conciliation procedure instituted by the League of Nations having proved abortive in consequence of the refusal of both parties to accept the Council's recommendation, the Council terminated the conciliation procedure, and suggested the laying down of a provisional demarcation line, *but entirely reserved the territorial rights of the two States*. When she applied to the Conference, Lithuania was therefore justified in emphasizing Poland's " solemn undertakings," since the Suvalki Agreement had not been replaced by any other *definite* convention. On the other hand, since the Conference did not even mention these undertakings in its decision, it is evident that it did not " take into account " the reservation made on this subject by the Lithuanian Government.

2. In regard to the reservation to take into account the *rights of Lithuania*, the following assertions may be made :

The decision of the Conference reads : " Whereas, as regards the frontier between Poland and Lithuania, there is cause to take into account the *de facto* situation resulting especially from the resolution of the Council of the League of Nations of February 3, 1923."

It has already been stated that the resolution of February 3, 1923, which divided the neutral zone in the Vilna region, was not accepted by Lithuania. Nevertheless, Poland having extended her administration over the part of the neutral zone ascribed to her by the Council's recommendation, Lithuania was obliged to submit *de facto* to the Council's will. Now, the said resolution of February 3 reads : " The demarcation thus laid down (see Annex 461 (a)) shall retain the provisional character referred to in the Council's recommendation of January 13 and May 17, 1922, and the territorial rights of both States shall remain absolutely intact." [1] It is upon this resolution instituting a *provisional* demarcation line and reserving the territorial rights of the two States, that the decision of the Conference of Ambassadors relies to legalize the " *de facto* situation " which, according to it, would especially result therefrom.

The undersigned is of opinion that the decision of the Conference of March 15, 1923, erroneously deemed itself entitled to ascribe to the resolution of the Council of the League of Nations of February 3, 1923, a meaning which the clear and precise text

[1] *Official Journal of the League of Nations*, March 1923, p. 238.

of the latter expressly excluded. One really fails to see why the Council's resolution establishing a *provisional* demarcation line should have engendered a *de facto* situation compelling the Conference to take account thereof in order to attribute to this line a *definite* character. On the other hand, it does not follow from the Conference's decision that it has devoted itself to any examination whatsoever of the territorial rights of the two States. It purely and simply declares that there is *cause* to take account of the *de facto* situation resulting especially from the resolution of the Council. Thus the Conference of Ambassadors, without any apparent juridical motive, has attributed a definite character to a resolution of the Council which had in advance repudiated such a transformation. This decision therefore bears a purely political character.

The undersigned is of opinion that, in acting thus, the Conference of Ambassadors did not take into account the *rights* of Lithuania reserved by the Lithuanian note of November 18, 1922.

The expression "especially" (*notamment*) employed by the decision of the Conference of Ambassadors of March 15, 1923, furthermore justifies the conclusion that this Conference considered that it ought to take into account not only the *de facto* situation resulting from the Council's resolution of February 3, 1923, *but the "de facto" situation in general.*

Nevertheless, the undersigned does not think that it would be useful to devote himself here to conjectures on the *other de facto* circumstances which, by the expression "especially," the Conference of Ambassadors wished to have in view. He is of opinion that it will suffice simply to affirm that the decision of the Conference resolves itself into a legitimation of a *"de facto" situation, the provisional character of which has been recognized by the Council of the League of Nations.* Actually it appears to the undersigned beyond doubt that the rights accruing to Lithuania from the unanimous resolutions of the Council of the League of Nations—of which, moreover, all the members of the Conference of Ambassadors form part—are included in the category of *rights* which the Lithuanian note of November 18, 1922, reserves. In disregarding the provisional character of the resolution of the Council of the League of Nations of February 3, 1923, the Conference of Ambassadors has therefore encroached upon a vested right of Lithuania.

To recapitulate, it follows from the examination of points 1 and 2, that the decision of March 15, 1923, of the Conference

of Ambassadors—setting aside the "vital interests" of Lithuania—did not take into account either the international agreement of Suvalki, which enters into the category of the "solemn undertakings" of the Polish State towards the Lithuanian State, or the "rights" vested in Lithuania by the unanimous resolution of the Council of the League of Nations. Asked by Lithuania to render a decision, while *taking into account* certain international acts, i.e. upon the basis of law, the Conference exceeded this demand by declaring that there was cause to *take into account the "de facto" situation.* The decision of March 15, 1923, is therefore tainted with *an evident excess of power.*

If this decision had been rendered on the basis of a regular compromise of arbitration, stipulating the observation of the agreements and rights contained in Lithuania's note of November 18, 1922, the arbitral decision of the Conference would have been null by virtue of the unwritten arbitration law [1] since, to use the language of M. Politis, it would have disregarded "the imperative provisions of the compromise as regards the rules to be applied." As we have proved, the decision of the Ambassadors is not, in any case, an arbitral award. Nevertheless, whatever its character, it remains no less true that it invokes, in its preambles, a demand of the Polish Government of February 15, 1923, and a demand of the Lithuanian Government of November 18, 1922. The Conference of Ambassadors thus implicitly admitted that it owed its competence to those two demands and, consequently, was bound to rule within their limits. From that moment, in the opinion of the undersigned, the fact of having exceeded those limits, although in relation to only one of the appellants (Lithuania), must exercise upon the validity of the Ambassadors' decision the same effect as would have had a disregarding, by an arbitral award, of the imperative rules of a compromise of arbitration concluded between Lithuania and

[1] Compare Article 27 of the settlement of procedure voted on August 28, 1875, by the Institute of International Law: "The arbitral award is null in the event of a null compromise or of *excess of power* or of proved corruption of one of the arbitrators or of essential error." N. Politis, *Le Justice internationale,* 1924, section "Le droit coutumier arbitral," p. 91: "We can imagine the possibility of a refusal of fulfilment only if the award is tainted with nullity. It bears that character on the supposition of an irregular compromise and in that of an excess of power on the part of the arbitrator. . . . Excess of power can occur in various ways. It does so in the event of an improper interpretation of the compromise. . . . It does so still more in the event of a disregarding of the imperative provisions of the compromise as to the rules to be applied."

Poland. *In equity, the excess of power must entail, in both cases, the nullity of the decision.*

CONCLUSION

Relying upon the foregoing facts and arguments, the undersigned jurisconsult has the honour to reply as follows to the question submitted by the Lithuanian Government:

The Government of the Lithuanian Republic is not bound, either in law or equity, by the decision of the Conference of Ambassadors of March 15, 1923, regarding the Polish-Lithuanian frontiers.

(*Sgd.*) ANDRÉ MANDELSTAM.

PARIS, *June* 1, 1928.